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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 706

SANGAMON VALLEY TELEVISION CORPORATION
and
STATE OF ILLINOIS, *Petitioners,*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, ILLIANA TELECASTING CORPORATION, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., PLAINS TELEVISION CORPORATION, and METROMEDIA, INC., *Respondents.*

JOINT PETITION BY SANGAMON VALLEY TELEVISION CORPORATION AND THE STATE OF ILLINOIS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported officially, and is printed as an appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1963. A petition for rehearing en banc filed by Sangamon Valley Television Corporation was denied on September 25, 1963; a petition for rehearing en banc by the State of Illinois was denied on November 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission violated Section 307(b) of the Communications Act, and acted arbitrarily and capriciously, in adopting (for the second time) an order which deleted the only VHF television channel from Springfield, Illinois and reassigned it to St. Louis, Missouri, and Terre Haute, Indiana.

STATUTE INVOLVED

This case involves Section 307(b) of the Communications Act,[1] which provides as follows:

> "In considering applications for licenses, and modifications and renewals thereof: when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

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[1] Act of June 19, 1934, c. 652, § 307(b), 48 Stat. 1084, as amended by Act of June 5, 1936, c. 5, § 2, 49 Stat. 1475, 47 U.S.C. § 307(b).

STATEMENT OF THE CASE

Petitioners challenge the validity of a report and order of the Federal Communications Commission which was adopted on July 18, 1962. (J.A. 303-332.) Because of the somewhat unique procedural situation which existed at the lower appellate level, a preliminary explanation thereof may be of assistance to the Court.

Three separate and distinct petitions were filed in the court of appeals for review of the Commission action here involved. In Case No. 17,380, co-petitioner Sangamon Valley Television Corporation (the applicant for the use of VHF television Channel 2 in Springfield, Illinois) sought reversal of the deletion of Channel 2 from Springfield and its reassignment to St. Louis, Missouri, and Terre Haute, Indiana. Co-petitioner State of Illinois intervened in that case, taking essentially the same position as Sangamon Valley.[2] In Case No. 17,356, 220 Television, Inc. (the licensee of a television station operating on a previously assigned VHF channel in St. Louis) challenged the addition of another VHF station to St. Louis.[3] In

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[2] Sangamon Valley Television Corporation first filed its petition for review in the United States Court of Appeals for the Seventh Circuit. On motion by the Federal Communications Commission, that court exercised its discretion and transferred the case to the United States Court of Appeals for the District of Columbia Circuit (notwithstanding pleadings in opposition to such a transfer by Sangamon Valley and the State of Illinois).

[3] There are only three national television networks, and respondent Signal Hill's St. Louis station is affiliated with respondent ABC's (American Broadcasting-Paramount Theatres, Inc.) network. Thus, the addition of Channel 2 to St. Louis left 220 Television without a network, and it has sustained more than $1,000,000 in operating losses since going on the air in April of 1959. (J.A. 181.)

Case No. 17,279, Fort Harrison Telecasting Corporation (a would-be applicant for Channel 2 in Terre Haute) took issue with the Commission's refusal to accept new applications for the facility when it again reallocated Channel 2 to Terre Haute.

Although the parties thus raised essentially different questions, they consented to a consolidation of the cases for the convenience of the court of appeals. The majority opinion of the court of appeals makes clear the differing positions of the parties below (note the sections headed by Roman numerals in the lower court's opinion); that court affirmed (by a vote of 2-1) the reallocation of Channel 2 and unanimously reversed the Commission's refusal to accept new applications for Channel 2 in Terre Haute. The dissent was limited to the reallocation of Channel 2; Circuit Judge Wright took the position that there was an "obvious" violation of Section 307(b). He also stated that such action was arbitrary and capricious. (Appendix, p. 21a.)

The present co-petitioners are interested only in the deletion of Channel 2 from Springfield, with its concurrent reassignment to St. Louis and Terre Haute. Sangamon Valley Television Corporation and the State of Illinois participated below only in Case No. 17,380; they did not intervene in or take any position with respect to Cases No. 17,279 and 17,356.

The majority and dissenting opinions below set forth many of the relevant facts, and needless repetition here will be avoided. However, partly because the decision of the court of appeals omits certain critical facts, and partly because the action of the Commission constitutes essentially a repetition of similar action dealt

with by this Court earlier in the history of this lengthy case, the following supplemental information is included within this statement of the case:

The Federal Communications Commission made its first allocation of television channels on June 27, 1945. It then assigned VHF (very high frequency) television channels to more than 100 of the largest metropolitan areas of the country. Springfield, the centrally located capital of the nation's fourth most populous state, was assigned two VHF channels.[4] Because television then was largely an unknown quantity, no one sought authority to operate on those channels prior to September of 1948, when the Commission adopted a "freeze" on the granting of television authorizations pending a study of nationwide allocation problems.[5]

Co-petitioner Sangamon Valley Television Corporation applied for the use of a VHF channel in Springfield while the freeze was pending. The freeze was lifted when the Commission adopted its so-called Sixth Report and Order on April 11, 1952.[6] In that action the Commission shifted many of the prior VHF channel assignments to meet certain mileage separation standards, and, for the first time, allocated UHF (ultra high frequency) channels throughout the country. In the Sixth Report and Order, the Commission concluded that it "should disperse both VHF and UHF widely among states and communities."[7] The assign-

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[4] 10 FED. REG. 12267, 12269 (1945).

[5] 13 FED. REG. 5182 (1948).

[6] 1 PIKE & FISCHER RADIO REG. 91:601-1112.

[7] *Id.* at 91:663.

ment of only VHF channels or only UHF channels to particular communities was rejected as contrary to the public interest. Since VHF stations even then were recognized as being able to cover considerably larger areas than UHF stations, making it desirable to allocate VHF channels to broad areas of common interest, "the 12 VHF channels were distributed as broadly as possible."[8] The Sixth Report and Order made the following channel assignments to the states and communities here involved (1960 census figures also are given):

	1960 Population	No. of VHF Channels	No. of UHF Channels
Springfield	83,271	1	2
State of Illinois	10,081,158	11	50
St. Louis	750,026	4	3
State of Missouri	4,319,813	17	38
Terre Haute	72,500	1	2
State of Indiana	4,662,498	7	41

As the Court is generally aware, the vastly more desirable VHF channels became the subjects of multiple applications and comparative hearings, while the inferior UHF channels were virtually unwanted and were available for the asking.[9] While co-petitioner Sangamon Valley Television Corporation was engaged in a comparative hearing for the use of Channel 2 in Springfield, respondent Plains Television Corporation placed a UHF station on the air in that city in 1953.

[8] *Id.* at 91 :621.

[9] As early as 1958, before the differences between VHF and UHF were as well known as they are today, the court of appeals succinctly recognized VHF channels to be "superior" and UHF channels to be "inferior." *WIRL Television Co.* v. *United States*, 253 F.2d 863, 866 (D.C. Cir.), *vacated*, 358 U.S. 51 (1958).

It remains Springfield's only television station today. While two of St. Louis' VHF channels were tied up in comparative hearings, respondent Signal Hill Telecasting Corporation obtained a quick grant and placed a UHF station on the air to serve that city.

As the VHF comparative hearings neared their conclusions, some UHF operators such as respondents Signal Hill and Plains took steps to insulate themselves from the VHF competition which they had anticipated when they voluntarily obtained unopposed UHF grants. The term "deintermixture" was coined to connote the possible deletion of single VHF channels from a few selected communities to protect the competitive positions of UHF operators in those communities.

Springfield was among the small number of communities to be considered for deintermixture, and the Commission invited the submission of written comments with respect to the possible reallocation of Channel 2 to St. Louis in a proceeding separate from the comparative hearing in which Sangamon Valley was a party. On February 26, 1957, the Commission adopted a report and order in Docket No. 11747 amending its 1952 table of assignments by reallocating Channel 2 from Springfield to St. Louis and Terre Haute.[10] The Commission simultaneously reallocated respondent Signal Hill's UHF Channel 36 from St. Louis to Springfield—although Signal Hill had made no re-

[10] 22 F.C.C. 318 (1957). Terre Haute was an afterthought; the Commission originally proposed to move Springfield's Channel 2 only to St. Louis.

quest for such action on the record.[11] The move of Signal Hill's channel thus paved the way for that party to be simultaneously awarded the right to operate on Channel 2 in St. Louis; for the first and only time in the history of television the sole VHF channel assigned to a major city (Springfield) was deleted and given to an existing UHF operator (Signal Hill) in another city (St. Louis).

Some time later, the Interstate and Foreign Commerce Committee of the House of Representatives formed a Subcommittee on Legislative Oversight which investigated a number of television cases. Testimony before that subcommittee revealed that while the proceeding involving the possible reallocation of Channel 2 was pendente lite, the president of Signal Hill made an extraordinary series of ex parte ap-

[11] One point should be clearly understood. Respondents repeatedly have referred to the "substitution" of two UHF channels for the single VHF channel in Springfield. This is purely a smokescreen; virtually any number of UHF channels can be assigned to Springfield irrespective of where Channel 2 is assigned—but this does not mean that anyone will operate on them. Economic factors, rather than words, control; Springfield has had three UHF *channels* since 1957 but only one *station*. Sangamon Valley and the State of Illinois repeatedly have advised the Commission of their conviction that Springfield never will have more than one UHF station (due essentially to VHF signals originating elsewhere which can be received in the area and to the difficulty in having a UHF station receive a network affiliation); such contentions have been ignored by the Commission but have been proven correct by the passage of time. Excluding Channel 2, on the date of the latest reallocation (July 18, 1962) all of the VHF channels assigned to the states of Illinois, Missouri, and Indiana were in use. However, only ten of Illinois' 53 UHF channels were in use, only two of Missouri's 37 UHF channels were in use, and only 11 of Indiana's 48 UHF channels were in use. 63 ed.). (Some changes in UHF assignments were made between 1952 and 1962.)

proaches to every member of the Commission in his successful effort to have the channel moved to St. Louis for Signal Hill's benefit.[12]

On July 3, 1957, Sangamon Valley, then still unaware of the improper ex parte activities of respondent Signal Hill, filed a petition for review of the reallocation of Channel 2 in the United States Court of Appeals for the District of Columbia Circuit. That court, also then uninformed as to Signal Hill's ex parte conduct, subsequently adopted a cursory per curiam opinion in which it concluded, on the basis of the substantially different then-existing record, that it was "unable to sustain" Sangamon Valley's contention that the reallocation violated Section 307(b) of the Communications Act.[13]

Sangamon Valley then petitioned this Court for a writ of certiorari, asserting that the Commission and the court of appeals had failed to give proper effect to the requirement of Section 307(b) of the Communications Act as construed and applied by this Court in *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933), and *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). In opposing that petition, the United States and the Commission felt obliged "to call the Court's attention" to the fact that it appeared that extensive ex parte approaches

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[12] In addition to arguing the merits of the case repeatedly off the record to each of the Commissioners individually "'in privacy in their offices,'" the president of Signal Hill "had every Commissioner at one time or another as his luncheon guest, and . . . he gave turkeys to every Commissioner in 1955 and in 1956." *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221, 223-24 (D.C. Cir. 1959).

[13] *Sangamon Valley Television Corp.* v. *United States*, 255 F.2d 191, 192 (D.C. Cir. 1958).

had been made to Commissioners while the case had been pending before the agency. This Court granted Sangamon Valley's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case to the court of appeals "for such action as it may deem appropriate." [14]

After receiving briefs and oral argument on the significance of the facts as to Signal Hill's ex parte influence which had been developed by the Subcommittee on Legislative Oversight, the court of appeals on May 8, 1959 vacated the reallocation of Channel 2 because of that respondent's "private approaches to the members of the Commission" and remanded the proceeding to the agency for an evidentiary hearing.[15] That hearing revealed a vastly more aggravated pattern of ex parte influence on behalf of Signal Hill than had been revealed to the Subcommittee on Legislative Oversight, yet the Commission—half of whose remaining members had been among those subjected to Signal Hill's prior ex parte blandishments—proposed no more than to permit other parties to reply on the record to what was discovered to have been done by Signal Hill off the record.[16] This proposed procedure was

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[14] *Sangamon Valley Television Corp.* v. *United States*, 358 U.S. 49-50 (1958).

[15] *Sangamon Valley Television Corp.* v. *United States*, *supra* n. 12, 269 F.2d at 224.

[16] Not surprisingly, the Commission in proposing such a procedure was silent as to how other parties could rebut such of Signal Hill's prior activities as the entertainment of Commissioners at luncheons, at the theatre, and at the home of Signal Hill's president, could rebut gifts of turkeys to Commissioners and stockings to their secretaries, and could rebut scores of personal visits by Signal Hill's president to Commissioners in their offices, the latter of which included both oral and written ex parte representations on the merits of the proceeding.

objected to by Sangamon Valley and the Department of Justice, and was rejected after briefs and oral argument by the court of appeals on July 27, 1961.[17] The court then made it clear to the Commission that future decisions as to the ultimate location of Channel 2 could be based only upon an untainted record made in an "entirely new proceeding." [18]

The supposedly new proceeding which is now before this Court was instituted by a notice of proposed rule making which was adopted on September 7, 1961. (J.A. 6-7.) Comments and reply comments were filed on December 4, 1961 and January 11, 1962, respectively. Although the prior reallocation of Channel 2 had been vacated as a result of successive actions by this Court and the court of appeals, Signal Hill continued to utilize the frequency in St. Louis on a "temporary" basis during this entire period.

The only parties supporting the reallocation of Channel 2 were private parties with direct financial interests in the ultimate location of the channel. (This is stated as a fact, not to imply any impropriety thereby.) Never has the City of St. Louis, the State of Missouri, the City of Terre Haute, or the State of Indiana expressed any interest in or need for Channel 2. Conversely, the State of Illinois repeatedly has asserted its interest in and need for a wide coverage VHF television station in its centrally located capital city.

One fact alone demonstrates the vital importance of this case to the State of Illinois. Springfield is the

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[17] *Sangamon Valley Television Corp.* v. *United States*, 294 F.2d 742 (D.C. Cir. 1961).

[18] *Id.* at 743.

seat of the Illinois Government, and the site of various courts, the State Fair, and numerous events which are of major educational, civic, political, and historical interest and significance to the people of the State of Illinois. (J.A. 147-50.) A Channel 2 station in Springfield would furnish a television signal of Grade B or better intensity to 1,174,017 people in an area of 15,286 square miles. A UHF station in Springfield can furnish a Grade B or better signal to only 467,888 people in an area of only 6,212 square miles—less than half the coverage of a VHF facility. (J.A. 165, 174, 176.)

On July 18, 1962, the Commission again deleted Springfield's only VHF channel and again gave it to respondent Signal Hill for its continued use in St. Louis.[19] Since the channel also can be fitted into Terre Haute once it is taken out of Springfield, that Indiana city—smaller than Springfield and not the state capital—acquired its second VHF channel. St. Louis thus received its fifth VHF channel at the expense of the only one previously allocated to the capital of Illinois; Missouri, with a population less than half that of Illinois, thus received its 18th VHF channel leaving Illinois with but ten.

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[19] The majority opinion of the court of appeals states: "We note also that the membership of the Commission which rendered the 1962 decision was substantially different from the membership participating in the 1957 decision." (Appendix, p. 11a.) Such a statement, we respectfully suggest, is misleading. Of the six Commissioners who voted in 1962 to move Channel 2 again, three had been subjected to substantial ex parte influence by Signal Hill prior to voting for such a result in 1957. We do not consider this to be a "substantially different" membership, particularly since a different result in 1962 would have constituted an implied acknowledgment that the 1957 action had indeed been brought about by improper influence.

The petition for review which gave rise to the 2-1 affirmance of the reallocation of Channel 2 by the court of appeals was predicated jurisdictionally on Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), which incorporates by reference the Judicial Review Act of 1950, as amended, 5 U.S.C. § 1031 *et seq.*

REASONS FOR ALLOWANCE OF THE WRIT

The action of the Commission and the affirmance thereof by the court of appeals are violative of Section 307(b) of the Communications Act and in conflict with applicable decisions of this Court in the following multiple particulars:

(1) The reallocation of Channel 2 was taken for the purpose of enhancing the competitive positions of individual station operators, and wholly without regard for the needs for Channel 2 of the respective communities and states involved.

(2) The agency and appellate actions now before the Court deal only in terms of the communities and totally disregard even the existence of the states involved, thus not only circumventing but effectively amending a valid statutory provision.

(3) The reallocation of Channel 2 was taken in the face of express Congressional disapproval of the concept of "deintermixture."

(4) The prior reallocation of Channel 2, although legally vacated by this Court and the court of appeals because of the improper ex parte influence which led to the reallocation originally, formed the principal basis for the second reallocation despite a clear directive that the entire matter be considered anew.

(5) The reallocation of Channel 2, unless reversed by this Court, will leave the people of the State of Illinois forever without a vitally needed wide coverage television station in their centrally located state capital.

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT

It is axiomatic that administrative agencies normally have broad discretion in the exercise of their rule making powers, and the allocation of television channels normally is a rule making function. In enacting the Communications Act of 1934 (and its predecessor, the Radio Act of 1927), however, Congress recognized that a statutory limitation had to be placed on the discretion of the agency in allocating broadcasting frequencies to avoid possible discrimination against any state or community. Thus, Section 307(b) of the Communications Act (like its predecessor Section 9 of the Radio Act[20]) was enacted to *require* that broadcast facilities be distributed fairly, efficiently, and equitably among the several states and communities.

As Judge Wright stated in his dissent below: "This language of Section 307(b) means what it says." (Appendix, p. 17a.) This was stressed by this Court in the analogous *Allentown* case. There, applicants from the respective cities of Easton and Allentown in Pennsylvania each sought a radio frequency which only one could have. Allentown had three radio stations, while Easton had but one. Although Allentown was several times larger than Easton, the Commission ruled that Easton's need for a second station was greater than Allentown's need for a fourth. On this

[20] 44 Stat. 1166 (1927).

basis alone the Easton application was granted. The court of appeals disagreed, taking the position that a Section 307(b) determination is merely one of the elements to be considered in deciding which of two communities should receive a broadcast facility that only one can have.[21] This Court reversed the court of appeals, holding that Section 307(b) requires the Commission to determine first, without regard for any other considerations, which of two competing communities has the greater need for the facility in question.[22]

This concept had been recognized by the Commission after this Court construed the statutory predecessor of Section 307(b) in *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co., supra*, 289 U.S. 266 (1933). There, an applicant sought a new radio station in Gary, Indiana, and applied for a frequency which was in use by an existing station in Chicago. Based upon the more precise system of evaluating frequencies which was then in existence, Illinois had more than its fair and equitable share of frequencies, while Indiana had less. The Commission accordingly took the facility away from the existing Illinois station and awarded it to the Indiana applicant. This Court affirmed that result, saying:

> "In making its 'fair and equitable allocations,' the Commission was entitled and required to consider all the broadcasting facilities assigned to the respective states, *and all the advantages there-*

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[21] *Allentown Broadcasting Corp.* v. *FCC*, 222 F.2d 781 (D.C. Cir. 1954).

[22] *FCC* v. *Allentown Broadcasting Corp., supra*, 349 U.S. 358 (1955).

> *by enjoyed,* and to determine whether, in view of all the circumstances of distribution, a more equitable adjustment would be effected * * *." 289 U.S. at 281-282 (emphasis added).

The Court further said:

> "The concern of the Congress was with the interests of the people,—that they might have a reasonable equality of opportunity in radio transmission and reception, and this involved an equitable distribution not only as between zones but as between states as well." 289 U.S. at 283.

Until the instant case, there was little mystery to this concept. In adopting its Sixth Report and Order in 1952, the Commission readily recognized that the substantial superiority of VHF over UHF required a fair and equitable distribution of VHF channels. Thus, it was a "basic element in the Commission's assignment plan . . . that large cities should [not] receive an undue share of the relatively scarce VHF channels . . . ."[23]

How, then, did the Commission seek to justify in light of Section 307(b) its deletion of Springfield's only VHF channel to give St. Louis its fifth? The answer is that it did not. Since any consideration of relative community and state needs could lead to only one answer, the Commission ignored relative needs in a cursory reference to Section 307(b). (J.A. 328-29.) Instead, it talked in terms of how desirable it would be to make multiple UHF channels available to Springfield so that the capital theoretically could have a number of competitively equal facilities. (See footnote 11, *supra.*) After first appearing to decide (com-

[23] 1 PIKE & FISCHER RADIO REG. at 91:621.

pletely speculatively, that Springfield would be better off without Channel 2, the Commission then euphemistically says, in effect, as long as we are removing Channel 2 from the Illinois capital, let's put it in St. Louis. (J.A. 320-21.)

This approach is both illusory and illegal. Nowhere in the Communications Act is there any provision for competitive equality within a given market, and all relevant authority has rejected the idea that the public interest can be subordinated to the private economic interests of station operators. As this Court made clear in the *Sanders* case:

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."[24]

When the Commission first deleted Channel 2 from Springfield in 1957, it sought to justify such action by contending—with no record support—that the city would soon have additional UHF stations.[25] As noted, time has proven the error of such a claim; today Springfield has only the single UHF station which it has had for ten years. It is the public's right to service which is protected by Section 307(b), not the competitive position of a private station operator, and

> ". . . it is not incumbent upon the Commission to evaluate the probable economic results of every

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[24] *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

[25] 22 F.C.C. at 327.

> license grant. Of course the public is not concerned with whether it gets service from A or from B or from both combined. The public interest is not disturbed if A is destroyed by B, so long as B renders the required service."[26]

The deletion of Channel 2 from Springfield means that many thousands of southern Illinois residents will never be able to receive Illinois-originated public affairs, educational, political, news, and discussion television programming; they will continue to be dependent for television service on VHF programming from St. Louis and Terre Haute. Indeed, the Commission's decision acknowledges that 716,687 residents *of Illinois* are within the Grade B contour of Signal Hill's Channel 2 station in St. Louis. (J.A. 324-25.) In the entire majority decision below, *not one word* is devoted to the interests or needs of the states involved; it is as though the word "states" is not contained in Section 307(b). This is the situation which so far departs from the clear intent of the statute as to cry out for correction by this Court. The majority, mesmerized by the Commission's tedious decision and speculative assertion that Springfield will be better off without Channel 2, has effected a de facto amendment of Section 307(b) by totally ignoring the need of the State of Illinois for a wide coverage television facility in its capital. The following language in the majority opinion below is illuminating:

> "We do not read *Allentown* as requiring that the relative needs of two communities for television transmission service be determined solely on the basis of the need for *VHF* service. Nor has any

[26] *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440, 444 (D.C. Cir. 1958).

decision to that effect been cited to us." (Appendix, p. 7a.)

If the statute were concerned only with communities, as the court was, the court's reading of *Allentown* might have some validity. But the statute requires a fair and equitable distribution of frequencies among the several states as well as among communities, and we here ask this Court to supply a decision to that effect so that the Commission and the court of appeals will not similarly err in the future.

In testifying before a Congressional Committee while the latest proceeding was pending before the Commission, the then-Chairman of the FCC freely acknowledged that competitive equality is the goal of deintermixture. He stated:

> "The general problem of deintermixture is to try to make, by deleting a V and substituting a U—is to try to make it competitively equal for all the broadcasters in that area. That is the general theory. And also to provide a choice of service to the viewer. That is the purpose of deintermixture."[27]

Perhaps some benefit could accrue to certain communities to have competitive equality within them (although we vigorously deny that such is the case with respect to Springfield). If the Commission believes this to be a desirable objective, however, it should ask Congress to amend the Communications Act, for as Section 307(b) is now written the Commis-

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[27] *Hearings on All-Channel Television Receivers and Deintermixture before the House Committee on Interstate and Foreign Commerce*, 87th Cong., 2d Sess. 189 (1962) [hereinafter *All-Channel Hearings*].

sion may not ignore and discriminate against a *state's* obvious need for a frequency simply by claiming that it thus can enhance the competitive climate in a given *community*. As this Court stressed in reversing an action of the Civil Aeronautics Board for that agency's failure to follow one of its statutory mandates, "the fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do."[28]

When the Commission's former chairman testified as to the basically competitive objective of deintermixture, he was supporting legislation which would require all television sets to be manufactured so as to be capable of receiving UHF as well as VHF signals. At that time, the Commission was considering approximately ten deintermixture cases. Although Congress naturally has favored the development of UHF, Congress quickly made apparent its strong opposition to the concept of deintermixture because of the inevitable loss of service which deintermixture causes. In response to Congressional inquiries the Commission submitted a written statement on March 16, 1962 in which it specifically rejected "selective deintermixture as a general or long-range solution for the television allocations problem."[29]

In response to overwhelming Congressional demand, the Commission promised a moratorium on deintermixture in exchange for the enactment of all-channel receiver legislation.[30] However, the Commission subse-

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[28] *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 325 (1961).

[29] *All-Channel Hearings*, *supra* n. 27, at 195.

[30] *Id.* at 195-98.

quently proceeded to advise Congress that in the pending Springfield deintermixture case, the application of a moratorium would upset the status quo rather than preserving it.[31] This stemmed solely from the fact that Channel 2 had been in "temporary" use in St. Louis since 1957 pursuant to the tainted decision which had been vacated by successive actions by this Court and the court of appeals. In the House and Senate Reports on the all-channel bill, both legislative bodies stressed their opposition to deintermixture.[32] The Senate Committee referred in its report to the Commission's reluctance to apply a moratorium to three cases—including this one—and stressed:

> "In deciding these cases, however, your committee expects the FCC to give weight to the Congressional policies set forth in this report, and specifically, to any loss of service to the public which would result in the abandonment of VHF channels allocated to the particular communities involved in these cases."[33]

Notwithstanding all of the foregoing, the Commission promptly thereafter returned Channel 2 to Signal Hill in St. Louis, thus depriving more than 700,000 people of Grade B or better television transmission service from the Illinois capital.[34] The Commission

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[31] *All-Channel Hearings*, *supra* n. 28, at 209.

[32] S. Rep. No. 1526, 87th Cong., 2d Sess. 1-7 (1962); H.R. Rep. No. 1559, 87th Cong., 2d Sess. 1-9 (1962).

[33] S. Rep. No. 1526, *supra* n. 32, at 6-7. The House Report (No. 1559, *supra* n. 32) contained essentially the same statement at pp. 7-8.

[34] To repeat, a Channel 2 station in Springfield would furnish Grade B or better service to 1,174,017 people in an area of 15,286 square miles; a UHF station there can furnish Grade B or better service to only 467,888 people in an area of only 6,212 square miles. (J.A. 165, 174, 176.)

opinion makes it apparent that the agency paid no heed to the prior appellate vacating of the improperly influenced first reallocation. In effect, the Commission was not considering whether to delete Springfield's only VHF channel; it was considering whether it should move to St. Louis' fifth VHF channel to the Illinois capital—precisely the opposite of the actual procedural situation involved.

Thus, the Commission speaks of the "proposed introduction of a *second* VHF competitive service" in the Springfield area, rather than in terms of deleting the Illinois capital's only VHF assignment.[35]. (J.A. 314.) The Commission relied on the fact that no one has been able to operate on Channel 2 at Springfield to conclude that the deletion of the channel "would not deprive anyone of an existing service." (J.A. 315.) It stated that since Signal Hill already was using Channel 2 in St. Louis, "there would have to be strong countering public interest considerations to lead to a conclusion to use Channel 2 at Springfield at this time." (J.A. 320.) It stated that putting Channel 2 in Springfield—where it was legally assigned—would constitute "dislocating action to worsen the competitive situation." (J.A. 320.) And, in ultimately deciding the case, the Commission said: "The competitive service provided by [Signal Hill's] station

[35] The Commission's acknowledgment that the use of Channel 2 in Springfield would result in a second competitive VHF service in the area illustrates the disingenuousness of its concurrent claim that the deletion of Channel 2 makes the area all-UHF. The Springfield area is not all-UHF from the standpoint of television reception (J.A. 175); for example, the VHF station in Champaign, Illinois has a larger audience in Springfield than does the local UHF station. And, ironically, some people in Springfield now can watch Channel 2 programs—but they come from St. Louis rather than from their own city. (J.A. 170-71.)

KTVI [on Channel 2 in St. Louis] for the last five years in the area would also, it is apparent, create a great void if deleted." (J.A. 324.) The equities thus built up by a proven wrong-doer, coupled with what might best be described as administrative inertia (the tendency of an agency to reinstate a prior action however wrong or invalid that action may have been), thus proved below to have been insuperable obstacles to those who, like Judge Wright, have believed that Section 307(b) means what it says.[36]

CONCLUSION

Sangamon Valley and the State of Illinois agree with the dissenting judge that this case,

> ". . . in all its ramifications, demonstrates the bankruptcy of the F. C. C.'s program for assigning VHF and UHF television channels pursuant to Section 307(b) of the Communications Act of 1934. It also shows what an administrative mess can result when improper influence is brought to bear on the individual members of the Commission in connection with making these assignments." (Appendix, p. 17a.)

In concerning itself solely with competitive considerations, the Commission did not even make a pretense of comparing the needs of Springfield and the

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[36] The lower court majority was troubled by the Commission's obvious reliance on the fact that Channel 2 was in use in St. Louis, and stated that "where cities are competing for channel allocations, a temporary allocation to one city rather than another should not operate to create vested rights." (Appendix, p. 14a.) The court resolved its doubts in favor of the Commission, however, because of its belief that the Commission's action was "adequately buttressed by the other grounds on which it relied." (*Ibid.*) This, we submit, was further error; agency action must be judged on the basis of the reasons given by the agency for its action. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943).

State of Illinois with the needs of St. Louis and the State of Missouri for Channel 2. It thus violated Section 307(b) of the Communications Act and the decisions of this Court construing the statutory requirement. In affirming such action, the majority of the court of appeals not only sanctioned the agency's obvious error, but compounded it by wholly ignoring the interests of the states involved, thus judicially removing the word "states" from the controlling statute.

This case epitomizes the reason for being of Section 307(b). The need of the State of Illinois for a VHF station in its centrally located state capital is urgent, and that public need has been unlawfully suppressed to date for the benefit of private interests. In light of all of the foregoing considerations, it is prayed that the instant petition for a writ of certiorari be granted.

Respectfully submitted,

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December 23, 1963

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,279

FORT HARRISON TELECASTING CORPORATION, PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS,

ILLIANA TELECASTING CORPORATION,
WABASH VALLEY BROADCASTING CORPORATION, INTERVENORS.

No. 17,356

220 TELEVISION, INC., PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
SIGNAL HILL TELECASTING CORPORATION, INTERVENORS.

No. 17,380

SANGAMON VALLEY TELEVISION CORPORATION, PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS,

SIGNAL HILL TELECASTING CORPORATION,
ILLIANA TELECASTING CORPORATION;
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
PLAINS TELEVISION CORPORATION,
220 TELEVISION, INC.,
THE STATE OF ILLINOIS,
METROMEDIA, INC.,
INTERVENORS.

On Petitions for Review of an Order of the Federal Communications Commission

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Decided June 27, 1963

Mr. H. Ralph Johnston, of the bar of the Supreme Court of Indiana, *pro hac vice*, by special leave of court, with whom *Messrs. Edward F. Kenehan* and *Henry R. Goldstein* were on the brief, for petitioner in No. 17,279.

Mr. Alan Y. Naftalin, with whom *Mr. Bernard Koteen* was on the brief, for petitioner in No. 17,356.

Mr. D. M. Patrick, with whom *Messrs. Stanley S. Harris* and *Jay E. Ricks* were on the brief, for petitioner in No. 17,380.

Mr. Daniel R. Ohlbaum, Associate General Counsel, with whom *Mr. Max D. Paglin*, General Counsel, and *Mrs. Louise H. Renne*, Counsel, Federal Communications Commission,

were on the brief, for respondent Federal Communications Commission. *Mrs. Ruth V. Reel*, Counsel, Federal Communications Commission, also entered an appearance in Nos. 17,279 and 17,356.

Mr. Thomas H. Wall, with whom *Mr. John B. Jacob* was on the brief, for intervenor Illiana Telecasting Corporation in Nos. 17,279 and 17,380.

Mr. Michael H. Bader for intervenor Wabash Valley Broadcasting Corporation, in No. 17,279. *Messrs. Andrew G. Haley* and *William J. Potts, Jr.*, were on the brief for intervenor Wabash Valley Broadcasting Corporation in No. 17,279.

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.*, was on the brief, for intervenor American Broadcasting-Paramount Theatres, Inc., in No. 17,356, and intervenors American Broadcasting-Paramount Theatres, Inc., Plains Television Corporation and Metromedia, Inc., in No. 17,380. *Mr. David S. Stevens* also entered an appearance for intervenor Plains Television Corporation.

Mr. Monroe Oppenheimer, with whom *Mr. Isadore G. Alk* was on the brief, for intervenor Signal Hill Telecasting Corporation in Nos. 17,356 and 17,380.

Mr. Maxwell Brooks Byus for intervenor The State of Illinois in No. 17,380.

Mr. Lionel Kestenbaum, Attorney, Department of Justice, was on the brief for respondent United States of America.

Before BAZELON, Chief Judge, and WASHINGTON and WRIGHT, Circuit Judges.

WASHINGTON, *Circuit Judge:* These cases present questions arising from the action of the Federal Communications Commission in transferring from Springfield, Illinois, the only VHF channel (Channel 2) allocated to that city,

and substituting two UHF channels.[1] Channel 2 was reallocated to St. Louis, Missouri, and Terre Haute, Indiana. Both the removal of the channel from Springfield and the reallocation to St. Louis and Terre Haute are challenged here. Related matters are also raised.

I.

The controversy has a long history. On April 14, 1952, the Federal Communications Commission issued its "Sixth Report and Order," completing a national television allocation plan for the 12 VHF channels and 70 UHF channels. This report and order put into effect a policy of "intermixing," that is, allocating both VHF and UHF channels to the same communities. VHF Channel 2 was allocated for use at Springfield, Illinois, along with two UHF channels. At that time the Sangamon Valley Television Company (hereafter referred to as Sangamon), the petitioner in No. 17,380, which had previously applied for authority to construct and operate a television broadcast station at Springfield, amended its application to request the use of VHF Channel 2 at Springfield. It is now the only applicant for

[1] We have heretofore dealt with a number of aspects of the UHF-VHF problem. See our decisions in Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954); Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F. 2d 686 (1956); Van Curler Broadcasting Corp. v. United States, 98 U.S. App. D.C. 432, 236 F. 2d 727, *cert. denied*, 352 U.S. 935 (1956); WIRL Television Co. v. United States, 102 U.S. App. D.C. 341, 253 F. 2d 863, *vacated*, 358 U.S. 51 (1958); and *remanded to the Commission*, 107 U.S. App. D.C. 21, 274 F. 2d 83 (1959); Springfield Television Broadcasting Corp. v. Federal Communications Commission, 104 U.S. App. D.C. 13, 259 F. 2d 170 (1958), *cert. denied*, 358 U.S. 930 (1959); Owensboro on the Air, Inc. v. United States, 104 U.S. App. D.C. 391, 262 F. 2d 702 (1958), *cert. denied*, 360 U.S. 911 (1959); Transcontinent Television Corp. v. Federal Communications Commission, 113 U.S. App. D.C. 384, 308 F. 2d 339 (1962).

such use.[2] Channel 2 has not been in actual use in Springfield.

On March 1, 1957, the Commission issued a Report and Order amending the allocation plan adopted in 1952. This order adopted a policy of "deintermixing," and began the process of assigning only VHF channels or only UHF channels to a given community.[3] In this order the Commission took VHF Channel 2 from Springfield and assigned it for use in St. Louis, Missouri, and Terre Haute, Indiana. In place of VHF Channel 2, it allocated to Springfield two more UHF channels: No. 36 and No. 26. On Sangamon's appeal this court held that the order deintermixing Springfield was not arbitrary, capricious, or inconsistent with Section 307(b) of the Communications Act. *Sangamon Valley Television Corp.* v. *United States*, 103 U.S.App.D.C. 113, 255 F.2d 191 (1958). The case was, however, remanded to us by the Supreme Court, 358 U.S. 49 (1958), because of certain testimony given before a congressional committee subsequent to our decision. We thereupon vacated the Commission's order of March 1, 1957, and remanded the case for an evidential hearing as to the ex parte approaches made to the Commissioners in connection with the 1957 Report and Order, as revealed in the cited testimony. *Sangamon Valley Television Corp*

[2] The application of WMAY-TV for VHF Channel 2 at Springfield has been withdrawn.

[3] The reason for the change in policy was the fact that experience had shown that as a general rule UHF stations were unable to compete successfully with VHF stations. That is, they were at a disadvantage in broadcasting range, in the price of sets for receiving UHF signals, in obtaining network affiliations, in securing listeners and advertisers, and were thus considered less desirable. See, *e.g.*, Coastal Bend Television Co. v. Federal Communications Commission, *supra* note 1; WIRL Television Co. v. United States, *supra* note 1; Note, *The Darkened Channels: UHF Television and the FCC*, 75 HARV. L. REV. 1578 at 1582 *et seq.* (1962).

v. *United States*, 106 U.S.App.D.C. 30, 269 F.2d 211 (1959). We later directed that an entirely new proceeding be conducted to determine where and to whom VHF Channel 2 should be assigned. *Sangamon Valley Television Corp.* v. *United States*, 111 U.S.App.D.C. 113, 294 F.2d 742 (1961).

The Commission initiated and conducted another proceeding relating to Channel 2, and in a Report and Order issued July 20, 1962, reached the same conclusions as in its 1957 order: that VHF Channel 2 should be taken from Springfield, Illinois, and be given to St. Louis, Missouri, and Terre Haute, Indiana, and that in compensation Springfield should be awarded UHF Channels 26 and 36.[4]

II.

In No. 17,380, Sangamon and the State of Illinois as intervenor have appealed as to the action taken in the 1962 order insofar as it affects Springfield. The parties have stipulated that the questions presented are (1) whether the Commission's action in deleting the only VHF channel assigned to Springfield, reassigning it to St. Louis and Terre Haute, and substituting for it in Springfield two UHF channels, violated Section 307(b) of the Communications Act, 47 U.S.C. § 307(b) (1958), and (2) whether in the circumstances this action was arbitrary and capricious.[5]

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[4] The Commission in its 1957 order awarded Channel 2 in St. Louis to Signal Hill Telecasting Corporation, and made a similar award in its 1962 order, on a temporary basis. This award is not before us in the present group of cases.

[5] As indicated above, both these contentions were made in the initial appeal and were found by us to be without merit. Sangamon Valley Television Corp. v. United States, 103 U.S. App. D.C. 113, 255 F. 2d 191 (1958). We reexamine the matter now in the light of the record presently before us.

(1) The principal contention of Sangamon and the State is that Section 307(b)[6] was violated because the Commission failed to determine initially whether Springfield on the one hand, or St. Louis and Terre Haute on the other hand, had the greater need for VHF Channel 2, which as a matter of electronic engineering could not be utilized by all three cities.

In *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955), the Supreme Court approved the principal that when mutually exclusive applicants seek authority to construct stations to serve different communities the Commission should first determine which community has the greater need for additional services, and then should determine any other questions presented. See 349 U.S. at 361-62. We do not read *Allentown* as requiring that the relative needs of two communities for television transmission service be determined solely on the basis of the need for *VHF* service. Nor has any decision to that effect been cited to us. In *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 281-82 (1933), the Court said, speaking of comparable provisions of the Radio Act of 1927, 44 STAT. 1166:

> "'We find in the Act no command with the import upon which respondents insist. The command is that there shall be a 'fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the States within each zone.' It cannot be said that this demanded equality between States *with respect to every type of station*. . . . In

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[6] Section 307(b) reads:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

> making its 'fair and equitable allocations,' *the Commission was* entitled and *required to consider all the broadcasting facilities assigned to the respective States*, and all the advantages thereby enjoyed, and to determine whether, in view of all the circumstances of distribution, a more equitable adjustment would be effected by the granting of the application of Station WJKS and the deletion of Stations WIBO and WPCC.'" (Emphasis added.)

The quoted language appears equally applicable here. We conclude that so long as the television transmission service allocated to a community, whether it be solely VHF, UHF, or a combination of both, is determined on the basis of relative need, amounts to a fair and equitable distribution of service for that community, in relation to others, and gives efficient service to the community, the standard set out in Section 307(b) is fully met.

We think that the Commission's action here with respect to Springfield—giving it four UHF channels, one reserved for educational purposes, and no VHF channel—meets this test. The Commission stated that its objective was

> "to distribute television channel assignments in the manner which is most likely to augment opportunities for full and effective use of the television broadcast frequencies and to provide the greatest amount of television service to the public in the communities involved. . . ."

and with respect to Springfield that its primary objective was

> "to provide Springfield, the capital of the State of Illinois, with a 1960 population of 83,271 and a population of 146,539 in its home county (Sangamon), with television assignments which offer the most realistic opportunities for the development of adequate television services to fill the needs and interests of the residents of the Springfield area. The question we

> must decide is whether all UHF assignments or VHF Channel 2 in combination with UHF assignments would best do so under present conditions, for it does not appear that other VHF channels may be assigned to Springfield under existing rules."

The Commission said further:

> "The responsibility of the Commission under the mandate of Section 307(b) would clearly not be met by a theoretically feasible VHF assignment at Springfield . . . which, in light of our conclusions, would have the result, at least for the foreseeable future, of destroying or inhibiting existing service in either or both the Springfield and St. Louis areas and of limiting opportunities for the growth of a greater number of television outlets and services in Springfield . . . . as well as in either or both the St. Louis and Terre Haute areas."

The Commission implemented this conclusion with detailed findings, with respect to each community involved, as to population, existing service, the need for additional outlets, and the type of additional service, UHF or VHF, which would best meet this need. In deciding upon a final pattern of assignments for Springfield and the other communities it took into account the public interest, the inferior competitive position of UHF in a VHF market, the competitive effect of Channel 2 in each of the communities before it,[7] so-called "white areas" (areas which would be without service), the greater coverage given by VHF,

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[7] In Federal Communications Commission v. Allentown Broadcasting Corp., *supra*, the Supreme Court indicated that in appraising the relative needs of communities for additional service, it is within the Commission's discretion to consider the need of one community for local competition. 349 U.S. at 362. See also Federal Communications Commission v. Sanders Radio Station, 309 U.S. 470 (1940). We think it clear that the Commission here could, as it did, consider the impact of Channel 2 on local UHF competition in Springfield, and the needs of St. Louis and Terre Haute for Channel 2 from competitive and other standards.

and the satisfactory service being given by UHF in Springfield.

The record shows that by 1960 all of the homes having television sets in Sangamon County, in which Springfield is situated, were equipped for UHF reception, that substantial percentages of the television homes in neighboring counties were similarly equipped, and that public acceptance of UHF in central Illinois had increased substantially. Furthermore, Congress, at the Commission's urging, has enacted legislation authorizing the Commission to require that all television receiving sets sold to the public after shipment in interstate or foreign commerce be equipped to receive all channels. See Act of July 10, 1962, Public Law 87-529, 76 STAT. 150. The Commission believes that if sets are so equipped, UHF will be increasingly used and expanded in intermixed areas and that UHF will have an incentive to improve its technological and service potentials.

The action taken here was of course in a rule-making proceeding. It is not for us to pass on the wisdom of a channel allocation scheme, but only to ascertain whether "the Commission action in this area committed to its discretion has a reasonable factual and legal basis." See *Coastal Bend Television Co.* v. *Federal Communications Commission*, *supra* note 1; *WIRL Television Co.* v. *United States*, *supra* note 1. We cannot say that the Commission's informed decision, that Springfield's need for additional television transmission service was fairly, efficiently, and equitably met by the allocation made to it, was in violation of the statute. While we entirely sympathize with the desire of the State of Illinois and Sangamon for a VHF channel at Springfield, it is not within our competency or function to say that Springfield's need could be met only by a single VHF channel rather than by two additional UHF channels, in the light of all the circumstances shown.

(2) We reject the argument that the Commission's decision to delete Channel 2 from Springfield and substitute two UHF channels therefor was arbitrary and capricious because it duplicated the March 1, 1957, decision on the question. The Commission states in its Report that it made its present decision in the light of current considerations and current appraisals of the needs of the communities involved, rather than those of 1957. In our view, its conclusions are amply explained and supported by its findings. We note also that the membership of the Commission which rendered the 1962 decision was substantially different from the membership participating in the 1957 decision.

Nor do we think it arbitrary to deintermix Springfield, even though deintermixture proceedings are in general being held in abeyance, pending results under the new all-channel legislation mentioned above. The Commission notified Congress[8] that the Springfield case would be one of four proceeded with because it would not involve any dislocation or disruption of existing service in the areas involved.[9] As we pointed out in *WIRL Television Co.* v. *United States*, *supra* at 344, 253 F.2d at 866, with respect to deletion of a VHF channel and substitution of two UHF channels at Peoria, Illinois, in similar circumstances, the long range goal of the Commission—which is reflected in the legislation—is to encourage UHF. As Springfield has never made use of VHF Channel 2, it is not arbitrary, as it was not in WIRL, to conclude that the goal will be better approached "by allotting it four technically equal

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[8] See H.R. Rep. No. 1559, 87th Cong., 2d Sess., 7-8, 21, 22-26; S. Rep. No. 1526, 87th Cong., 2d Sess., 6-7, 14, 15-19.

[9] We have seen that Channel 2, assigned to Springfield in 1952, has never been used there, but has been in use in St. Louis on a temporary basis following the 1957 allocation. See note 4, above.

UHF channels, rather than one superior VHF channel and two inferior UHF channels.'"[10]

III.

In No. 17,356, we are asked to review the decision of the Commission—made in the same rule-making proceeding—to allocate VHF Channel 2 in the Missouri area to St. Louis rather than to Rolla-Salem, Missouri.[11]

In 1959, petitioner 220 Television, Inc., was licensed to operate on VHF Channel 11 in St. Louis. As the latest licensee of the four operators of VHF stations there, it was unable to procure a network affiliation. From April 1959 to October 1, 1961, its operating deficit was more than $1,000,000. When the new proceeding in the Springfield "deintermixing" case was initiated in September 1961, 220 Television appeared before the Commission to urge the allocation of Channel 2 to the Rolla-Salem section of Missouri, which then had one unused UHF channel assigned to it.[12] The proposal was endorsed in numer-

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[10] In Greylock Broadcasting Co. v. United States, 97 U.S. App. D.C. 414, 416, 231 F. 2d 748, 750 (1956), we said:

> "If this court were to declare now that a new VHF station, which would eliminate UHF stations presently in an area, is in the public interest, that declaration would conclude the whole controversy now being so exhaustively explored by the Commission. We cannot do that on the evidence before us; indeed it is not our function to declare initially what is in the ultimate public interest."

[11] Rolla is a town with a 1960 population of 11,132 situated in a county with a 1960 population of 25,396. Salem's 1960 population was 3,870, and the 1960 population of the county in which it was located was 10,445. The two towns are about 26 miles apart.

[12] This proposal would also have permitted use of Channel 2 at either Springfield or Terre Haute under the Commission's spacing requirements. As part of the proposal 220 Television committed itself to apply for a permit to construct and operate a station to broadcast on Channel 2 at Rolla-Salem.

ous letters from local residents, organizations and public officials of communities in the Rolla-Salem area. The Commission, however, rejected the proposal, assigned Channel 2 to St. Louis, and awarded a license to operate on Channel 2 to Signal Hill, as already indicated. 220 Television has appealed.

(1) We are asked primarily to decide whether the Commission made a fair, efficient, and equitable distribution of broadcast service as between St. Louis and Rolla-Salem consistently with Section 307(b) of the Communications Act.

The Commission made detailed findings as to the television service presently available to the Rolla-Salem area, its population, the number of homes equipped to receive television, conditions of terrain and other matters. It pointed out that the assignment of Channel 2 to the area would virtually establish a one station monopoly and that the use of UHF in the area would provide opportunities for a greater number of local outlets and choice of services. It also noted that Channel 2 could not be used in the Rolla-Salem area "without depriving a large area and population in Illinois and Missouri of a needed competitive service." It concluded that the public interest would not be served by assigning Channel 2 to Rolla-Salem nor would such an assignment achieve a fuller, fairer or more efficient use of the television spectrum.

We think the Commission's conclusion with respect to Rolla-Salem are adequately supported, explained, and justified. We do not find them arbitrary and capricious, and we find no error warranting a remand. Cf. *Television Corporation of Michigan* v. *Federal Communications Commission*, 111 U.S.App.D.C. 101, 294 F.2d 730 (1961).

(2) Only one other question among those argued has not been disposed of by the foregoing discussion. In *Sangamon Valley Television Corp.* v. *United States*, 111 U.S.App.D.C. 113, 294 F.2d 742 (1961), we directed the

Commission to determine in a new proceeding where and to whom Channel 2 should be assigned. We there gave the Commission the right in its discretion to maintain existing services. The Commission in its discretion permitted Channel 2 to be used on a temporary basis in St. Louis pending final decision. Its latest conclusions as to the final assignment of Channel 2 appear to be predicated to some extent on the fact that Channel 2 was already being used in St. Louis, and that a change would deprive a large area and population of a needed competitive service. We are troubled by this line of reasoning. Temporary authorizations for station operation granted by the Commission should not be made the basis of preferring the holder of the authorization over other competing applicants for a permanent license. Similarly, where cities are competing for channel allocations, a temporary allocation to one city rather than another should not operate to create vested rights. But each situation of this sort must be judged on its own merits, and we are satisfied that the Commission's conclusions here are adequately buttressed by the other grounds on which it relied. Under the circumstances, we do not believe we would be justified in setting aside the Commission's action because it relied in part on the line of reasoning here under discussion.

IV.

In No. 17,279, Fort Harrison Telecasting Company appeals from the Commission's action in announcing that it would not accept new applications for use of Channel 2 at Terre Haute. This announcement was made in the Commission's Report and Order of July 20, 1962, here under review.

In 1957, Wabash Valley Broadcasting Corporation, now holding a license and operating on VHF Channel 10 in Terre Haute, applied to shift its operations from Channel 10 to Channel 2, the allocation of which to Terre Haute has now been affirmed by us in No. 17,380. Illiana

Telecasting Corporation likewise applied in 1957 for a license to operate on Channel 2 at Terre Haute. The Commission concluded a comparative hearing on the two applications in December 1959. It heard argument on the two applications en banc in 1960, but has not yet acted in the matter.[13]

Fort Harrison Telecasting Corporation was organized in 1960. Describing itself as a prospective applicant for Channel 2 at Terre Haute, it appeared before the Commission in the rule-making proceeding to support the allocation of that channel to Terre Haute. It stated that it assumed that if Channel 2 were allocated to Terre Haute the Commission would accept new applications for the channel, and requested the Commission to grant a temporary authorization for use of the channel pending completion of the comparative hearing.[14] The Commission determined that it would not open up Channel 2 at Terre Haute to new applications, stating:

> "We believe it only fair and just, and in the public interest, to bring the long-standing comparative proceeding for Channel 2 at Terre Haute to a close by disposing of the two applications under consideration therein on their merits as soon as possible after the effective date of the Terre Haute Channel 2 assignment. A long-awaited and needed second local outlet may thereby be established at Terre Haute without any further undue delay. All interested parties had an opportunity to apply for Channel 2 at Terre Haute in 1957. Three applicants applied. Their applications were designated for consolidated hearing on December 5, 1957. On April 29, 1958, one application was dismissed without prejudice. A comparative hearing on the other two applications was concluded in December of 1959, and the matter is now

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[13] The Examiner filed an initial decision in favor of Wabash Valley.

[14] Apparently it did not urge that this special authorization be made solely to Fort Harrison.

before the Commission for final action. In light thereof, new applications will not be accepted for Channel 2 at Terre Haute at this time."

Though we recognize the force of the reasons advanced by the Commission, we think its ruling was erroneous, in the light of our decision in *Sangamon Valley Television Corp. v. United States*, 111 U.S.App.D.C. 113, 294 F.2d 742 (1961). In that case, we directed the Commission to conduct an entirely new proceeding—the Commission's 1957 order having been vacated on May 8, 1959—saying "it would not be appropriate for the Commission to determine in 1961 on the basis of a somewhat supplemented 1957 record where and *to whom* VHF Channel 2 ought to be assigned." (Emphasis added.) In the new rule-making proceeding now before us for review the Commission determined the "where" for assignment of Channel 2—Terre Haute and St. Louis. It remains for it to conduct the new adjudicatory proceeding, which we directed, to determine the licensee of that channel in Terre Haute. Certainly that determination cannot be made on the basis of applications made in 1957 and hearings held in 1959, long before 1961, when we directed an entirely new proceeding. We reiterate that under our 1961 order the licensee of Channel 2 in Terre Haute is to be determined on the basis of the comparative qualifications of applicants as of the present time, rather than on a record made in 1959 concerning the qualifications of the then applicants.

In No. 17,279 we remand the case to the Commission with directions to permit the filing of applications[15] for a

[15] The Commission argues that since Fort Harrison did not file a timely application for the channel with the Commission, it is now barred from applying, citing Fort Harrison Telecasting Corp. v. Federal Communications Commission, 111 U.S. App. D.C. 368, 297 F. 2d 779 (1961). Whatever the force of this contention in ordinary circumstances, we think that our decision in the 1961 Sangamon case, 111 U.S. App. D.C. 113, 294 F. 2d 742, forecloses it here.

license to use Channel 2 in Terre Haute within a reasonable time limit to be set by the Commission in its discretion, and to hold a comparative hearing to determine which applicant shall receive the license. The Commission may in its discretion allow a temporary or interim use of the channel pending final determination, or adopt some other means of providing prompt service to Terre Haute, if in its judgment the public interest will be served by so doing.

The action of the Commission in Nos. 17,356 and 17,380 is affirmed. We remand as to No. 17,279 for action not inconsistent with this opinion.

So ordered.

WRIGHT, *Circuit Judge, dissenting:* The case, in all its ramifications, demonstrates the bankruptcy of the F.C.C.'s program for assigning VHF and UHF television channels pursuant to Section 307(b)[1] of the Communications Act of 1934. It also shows what an administrative mess can result when improper influence is brought to bear on the individual members of the Commission in connection with making these assignments.[2]

Section 307(b) requires that the Commission grant television channels, both UHF and VHF, "among the several States and communities [so] as to provide a fair, efficient, and equitable distribution of [television] service to each of the same." 47 U.S.C. § 307(b). This language of § 307(b) means what it says. *F.C.C.* v. *Allentown Broadcasting Co.*, 349 U.S. 358 (1955).

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[1] 49 Stat. 1475, 47 U.S.C. § 307(b).

[2] For other F.C.C. messes, see *WORZ, Inc.* v. *F.C.C.*, 106 U.S. App. D.C. 14, 268 F. 2d 889 (1959), *leave to file petition for writ of mandamus denied*, 361 U.S. 805 (1959); *Massachusetts Bay Telecasters* v. *F.C.C.*, 104 U.S. App. D.C. 226, 261 F. 2d 55 (1958), *cert. denied, sub nom. WHDH, Inc.* v. *Federal Communications Commission*, 366 U.S. 918 (1961); *WKAT* v. *Federal Communications Commission*, 103 U.S. App. D.C. 324, 258 F. 2d 418 (1958).

In its Sixth Report and Order on Television Allocations, 1 Pike & Fischer R.R. 91:601 (1952), the Commission attempted to comply with this congressional mandate by adopting a table for distribution of VHF and UHF frequencies on an intermixture[3] basis, recognizing that it should disperse both VHF and UHF channels widely among states and communities and that, while more VHF channels should be assigned to the metropolitan centers, "[a]t the same time—and this is a basic element in the Commission's assignment plan—the Commission did not believe that large cities should receive an undue share of the relatively scarce VHF channels." *Id.* at 91:621. In the table of distribution which accompanied this Sixth Report and Order, Channel 2 was assigned to Springfield, Illinois. In the present rule-making proceedings, the Commission has ordered Channel 2 moved from Springfield to St. Louis, leaving Springfield, the capital city of our fourth largest state, without a VHF channel and giving St. Louis a total of five.

The reason for the Commission's action is difficult to understand. Initially this rule-making proceeding was undertaken when the Commission was pursuing a deintermixture[4] policy which it had adopted as an interim measure while studying the advisability of abandoning the VHF band altogether and assigning only UHF channels. It was while the Commission was pursuing this policy that this court approved the Commission's action transferring Channel 2 from Springfield to St. Louis, only to have that approval vacated by the Supreme Court because of *ex parte* contacts with the Commissioners by the president of Signal Hill during the proceedings which may have influenced the Commission in ordering the

[3] Intermixture means assigning both VHF and UHF channels to the same area.

[4] Deintermixture involves limiting areas to either VHF or UHF channels.

change. *Sangamon Valley Corp.* v. *U. S.*, 358 U.S. 49 (1958).

The Commission's repeated effort to make this change was again voided, the second time by this court, which required the Commission to start anew and make a new record. *Sangamon Valley Television Corp.* v. *United States*, 111 U.S.App.D.C. 113, 294 F.2d 742 (1961). It is on this new record that the matter is now before us. The Commission has again ordered the removal of Channel 2 from Springfield to St. Louis. It has also decided to award Channel 2 to Signal Hill in that city.

Since the last remand, the Commission has changed its policy. It has abandoned deintermixture and re-embraced intermixture. It has sponsored legislation[5] requiring manufacturers to include a UHF band on all television receivers. In so doing, it advised the Congress that the proposed solution to the UHF—VHF problem involving use of only the UHF band was now rejected. The Commission also made it clear to the Congress "that it does not view deintermixture as a general or long-range solution for the television allocations problem. Quite to the contrary, the Commission has emphasized that an intermixed system utilizing both UHF and VHF channels is needed to achieve [their] long-range goal of an effective national television system and that the all-channel receiver legislation is the key to that long-range goal." S.Rep. No. 1526, 87th Cong., 2d Sess., to accompany H.R. Rep. No. 8031, 87th Cong., 2d Sess., reprinted in 1 U.S.Code Cong. & Adm. News, 87th Cong., 2d Sess., p. 1877 (1962). Thus it appears that instead of deintermixture or a 70-channel UHF-only television system, the Commission has now decided upon an intermixture policy using an all-

[5] Act of July 10, 1962, Public Law 87-529, 76 Stat. 150.

channel receiver as its solution to the UHF—VHF problem.[6]

Pursuant to the new policy, a moratorium has been ordered on all deintermixture proceedings pending before the Commission; with the exception of three or four, including Channel 2 in Springfield. These three or four deintermixture proceedings would continue, however, with the F.C.C. giving "weight to the congressional policies set forth in this report, and specifically, to any loss of service to the public which would result in the abandonment of VHF channels allocated to the particular communities involved in these cases." *Id.* at p. 1878. This same Committee Report went on to state: "We emphasize that the aim of this measure is an intermixed television system using both 12 VHF and 70 UHF channels." *Id.* at p. 1879.

Thus it appears that if this transfer of Channel 2 from Springfield to St. Louis is affirmed, in spite of the fact that the aim of Congress and the Commission's present policy is not deintermixture but intermixture. Spring-

[6] The Commission's brief, at pp. 12-13, reads:

"The Commission also proposed to Congress the adoption of so-called all-channel receiver legislation, to give the Commission authority to require that all television receivers shipped in interstate commerce be capable of receiving UHF as well as VHF channels. This legislation was enacted (Public Law 87-529, July 10, 1962). When the bill was being considered, the Commission, in response to Congressional inquiry, expressed its judgment that, during the period of time needed to indicate whether the all-channel receiver would in fact achieve *the Commission's goal of a satisfactory intermixed system*, it would be inappropriate to proceed with the eight new selective deintermixture proceedings initiated on July 27, 1961. However, the Commission expressly excluded from the proposed 'moratorium' four deintermixture proceedings which were then pending, including the Springfield Channel 2 situation, and this exclusion was accepted by Congress." (Emphasis supplied.)

field will be one of the three or four deintermixed communities in the country. It appears to me, therefore, that the transfer of Channel 2 would be an obvious violation of the congressional policy stated in § 307(b). Moreover, the Commission's action, in addition to violating § 307(b), is arbitrary and capricious in that it discriminates against the three or four communities in the country marked for deintermixture. In reaching these conclusions, in view of the background of this case, the expertise of the Commission has not been a compelling consideration.

I respectfully dissent.

No. 700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SANGAMON VALLEY TELEVISION CORPORATION, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR SIGNAL HILL TELECASTING CORPORATION IN OPPOSITION

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January 22, 1964.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia is reported at 324 F.2d 379, under the style *Fort Harrison Telecasting Corporation* v. *Federal Communications Commission*, and is also printed as part of the appendix to the Petition for a Writ of Certiorari (Pet. App. 1a-21a). The Report and Order of the Federal Communications Commission there affirmed (Docket No. 14267) is reported at 27 F.R. 7025 (July

25, 1962) and is also reported unofficially at 23 Pike & Fischer, Radio Regulation 1579.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1963. A petition for rehearing en banc by Sangamon Valley Television Corporation was unanimously denied on September 25, 1963; a petition for rehearing en banc by the State of Illinois was unanimously denied on November 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission acted in conformity with Section 307(b) of the Communications Act in deleting VHF Channel 2 from Springfield, Illinois, and substituting two UHF channels therefor, in order to improve the opportunities for UHF service among a greater number of stations in the Springfield and central Illinois area, the Commission having found that to retain VHF Channel 2 in Springfield "would have a blighting effect on existing UHF stations and on UHF development in the near future."

STATUTE INVOLVED

Section 307(b) of the Communications Act provides as follows:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same."

STATEMENT OF THE CASE

Petitioners challenge the validity of a "deintermixture" report and order of the Federal Communications Commission adopted on July 18, 1962, deleting VHF channel 2 from Springfield, Illinois and substituting therefor two additional UHF channels.

A similar report and order had been issued by the Commission on March 1, 1957. 15 Pike & Fischer Radio Regulation 1525. Sangamon Valley petitioned the United States Court of Appeals for the District of Columbia for review, claiming that this deintermixture of Springfield violated Section 307(b) of the Communications Act. On May 1, 1958, the Court of Appeals affirmed the March 1, 1957 action, the court finding "nothing arbitrary, capricious or otherwise illegal in the decision." *Sangamon Valley Television Corporation* v. *United States*, 103 U.S. App. D. C. 113, 255 F.2d 191

Sangamon Valley petitioned this Court for certiorari. On the basis of representations by the Solicitor General and Commission Counsel that various parties had apparently made ex parte presentations while the case was pending, this Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded for further action. *Sangamon Valley Television Corporation* v. *United States*, 358 U. S. 49.

On remand from this Court, the Court of Appeals vacated the order of March 1, 1957, and remanded the case to the Federal Communications Commission for a determination as to the nature and source of all ex parte pleas. (*Sangamon Valley Television Corporation* v. *United States*, 106 U. S. App. D. C. 30, 269 F.2d 221.) The Commission thereupon designated Judge Horace Stern as special hearing examiner to consider the nature and effect of the ex parte presentations that had been made.

After a full hearing, Judge Stern issued an Initial Decision of March 11, 1960, holding that the March 1,

1957, order was voidable requiring further action. 19 Pike & Fischer Radio Regulation 1055. However, Judge Stern held that "no member of the Commission should be required to disqualify himself", *ibid*, at p. 1074, and that "the conduct of no party was such as to disqualify it", *ibid*, at p. 1074.

Referring specifically to the presentations made by an officer of Signal Hill Telecasting Corporation, Judge Stern found that they were made (*ibid*, at page 1073, Finding of Fact 22):

> "in the honest belief that there was nothing improper in so doing in a rule-making proceeding, *a view more or less generally held at the time by members of the industry, by other interested parties, by public officials, and apparently by lawyers as well.*" (emphasis supplied)

The Commission, by Report and Recommendation of February 16, 1961 (19 Pike and Fischer Radio Regulation 1055), adopted most of Judge Stern's initial decision, including his conclusion that no member of the Commission was disqualified to participate in the reopened proceedings and that the conduct of no party was such as to disqualify it. On reviewing this Report and Recommendation, the Court of Appeals held that it was "unnecessary for the Commission to reconsider the conclusion expressed in its Report and Recommendation of February 16, 1961, that no Commissioner was disqualified and no party is absolutely disqualified." The Court of Appeals merely directed that the Commission institute a *de novo* proceeding to determine the deintermixture question on the basis of a new evaluation, and that a "fresh start is necessary" noting "it would not be appropriate for the Commission to determine in 1961 on the basis of a somewhat supplemented 1957 record where and to whom VHF channel 2 ought to be assigned". (*Sangamon Valley Television Corporation* v. *United States*, 111 U. S. App. D. C. 113, 294 F.2d 742.)

On September 11, 1961, a *de novo* notice of proposed rule making was issued. By Report and Order released July 20, 1962, the Commission concluded that Channel 2 should be deleted from Springfield and two UHF channels substituted therefor. (J.A. 303-332, also reported at 23 Pike & Fischer Radio Regulation 1579.) In its decision, the Commission first reviewed the reasons it had given for its March 1, 1957, deintermixture order, which were (J.A. 309):

> "It (the Commission) found in its decision (of 1957) that the Springfield area was predominantly UHF, the terrain was ideally suited for UHF probogation, the vast majority of sets in the area were equipped to receive UHF signals, and a number of UHF stations were providing satisfactory service. The Commission also found that . . . retention of the VHF assignment at Springfield would seriously jeopardize the ability of UHF to compete effectively in the area or to survive . . ."

The Commission then stated that its objective was the same as in 1957 (J.A. 309, 310):

> "Our primary objective is the same as it was in 1957—to provide Springfield, the capital of the State of Illinois . . . with television assignments which offer the most realistic opportunities for the development of adequate television services to fill the needs and interests of the residents of the Springfield area. The question we must decide is whether all UHF assignments or VHF Channel 2 in combination with UHF assignments would best do so under present conditions . . ."

The Commission then found that "while no additional UHF outlets have yet been established in Springfield itself, competing applications have been tendered for Channel 26 in Springfield" (J.A. 311); that UHF station WICS at Springfield "improved its facilities in 1958" (J.A. 312) and "established Station WCHU, operating

on Channel 33 at Champaign" (J.A. 312); that "UHF stations WICS—WCHU—WICD, and WTVP, together with Station WCIA at Champaign, now each provide a listenable signal throughout the Springfield—Decatur—Champaign—Danville area" (J.A. 312); that "The ARB 1960 Study indicates that 100 percent of the television homes in Sangamon County are now equipped for UHF reception (the estimate was 90% in 1957)" (J.A. 312); and that "public acceptance of UHF in central Illinois has increased substantially." (J.A. 313)

After reciting these findings of fact (not challenged here) the Commission found (J.A. 319, 320):

> "We have concluded, after consideration of the comments that the public interest would be served by continuing Springfield as an all-UHF area. First, we point out that unlike the usual situation, any dislocation results here from failing to deintermix. Springfield is now, in fact, an all-UHF area insofar as local service is concerned; to use Channel 2 there would result in intermixing the local television service. It would also *introduce*, into the broader market area, a second VHF service, which would undoubtedly become a dominant station, as is the first VHF (WCIA). *It would have a blighting effect on existing UHF stations and on UHF development in the near future.*" (emphasis supplied in last sentence)

Only after reaching this conclusion, did the Commission then decide that "as a by-product of not using Channel 2 in Springfield" (J.A. 321) the channel "may continue to be used at St. Louis" and "may also be used to provide Terre Haute with a second local VHF service" (J.A. 321).

The Court of Appeals affirmed the foregoing decision of the Commission. *Fort Harrison Telecasting Corporation* v. *Federal Communications Commission, supra.* Pe-

titioners' motions for reconsideration en banc were denied by unanimous actions of the Court of Appeals.

ARGUMENT

1. Petitioners' Reason "(1)", for Allowance of the Writ, is that the reallocation of Channel 2 was taken [as asserted by Petitioners, p. 13] "for the purpose of enhancing the competitive positions of individual station operators". (Pet. p. 13) But, the question of competitive advantage or disadvantage to private parties begs the question. For, if Channel 2 were assigned to Springfield, it would be Sangamon Valley Television Corporation which, as a private party, would have such a competitive advantage and benefit over existing UHF operators as to drive them out of business.

The question, rather, is not what action will benefit what private parties but what action would give the public of Springfield and adjacent areas the greatest number of competitive television services.

In essence, petitioners argue that VHF and UHF television are so unrelated that Section 307(b) requires a separate distribution of VHF and UHF channels, thus prohibiting the Commission from deleting VHF Channel 2 out of Springfield even though this will assure multiple UHF service for the public. This argument confuses ends with means. It would make an equal allocation of each type of channel an end in itself, regardless of the impact of such allocation on the total number of services received by a community. This would defeat, not promote, the purposes of Section 307(b). That section does not speak of an equal and equitable distribution of *frequencies* but of *service*. And if, as the Commission found, deletion of VHF Channel 2 would preserve and expand the total number of competitive television services on UHF channels, rather than destroy them, the Commis-

sion would clearly be warranted in requiring such deletion.

2. Petitioners' Reason "(2)", for Allowance the Writ, is that the Court and Commission actions deal "only in terms of the communities and totally disregard even the existence of the states involved." But, this clearly was not the case. The Commission explained (as already quoted above at p. 5) that (J.A. 309, et seq.):

> "our primary objective is the same as it was in 1957 —*to provide Springfield, the capital of the State of Illinois*, with a 1960 population of 83,271 and a population of 146,539 in its home county (Sangamon), with television assignments which offer the most realistic opportunities for the development of adequate television services to fill the needs and interests of the residents of the Springfield area. The question we must decide is whether all UHF assignments or VHF Channel 2 in combination with UHF assignments would best do so under present conditions, for it does not appear that other VHF channels may be assigned to Springfield under existing rules." (emphasis supplied)

Clearly the Commission, in the above italicized words, explicitly recognized that it was dealing with the fair and equitable allocation of television service not merely to Springfield considered as a local community but to "*Springfield, the capital of the State of Illinois.*" And, obviously, in considering Springfield as "the capital of the State of Illinois", the Commission's responsibility would not be met by a single theoretically feasible VHF assignment, if that would destroy multiple UHF service in the area. For, to blight multiple UHF service in Springfield considered as "the capital of the State of Illinois" would be no more in the public interest of the State of Illinois than of the local community of Springfield. In short, the Commission, far from "ignoring the need of the State of Illinois for a wide coverage television

facility in its capital" (Pet. p. 18) explicitly rejected such a facility because of its blighting effects on multiple UHF facilities in that very area.

As the Court of Appeals said (*Fort Harrison Telecasting Corp.* v. *Federal Communications Commission*, *supra*, at 384; Pet. App. 10a):

> "While we entirely sympathize with the desire of the State of Illinois and Sangamon for a VHF channel at Springfield, *it is not within our competency or function to say that Springfield's need could be met only by a single VHF channel rather than by two additional UHF channels, in the light of all the circumstances shown.*" (emphasis supplied)

3. Nor is there validity to Petitioners' Reason "(3)", for Allowance of the Writ, that the deletion of Channel 2 "was taken in face of express Congressional disapproval of the concept of deintermixture." As Judge Washington pointed out in his opinion (*Fort Harrison Telecasting Corp.* v. *Federal Communications Commission*, *supra*, at 384, 385, Pet. App. 11a):

> "The Commission notified Congress that the Springfield case would be one of four proceeded with because it would not involve any dislocation or disruption of existing service in the areas involved. As we pointed out in *WIRL Television Co.* v. *United States*, supra at 344, 253 F.2d. at 866, with respect to deletion of a VHF channel and substitution of two UHF channels at Peoria, Illinois, in similar circumstances, the long range goal of the Commission—which is reflected in the legislation—is to encourage UHF. As Springfield has never made use of VHF Channel 2, it is not arbitrary, as it was not in WIRL, to conclude that the goal will be better approached 'by allotting it four technically equal UHF channels, rather than one superior VHF channel and two inferior UHF channels.'"

4. Nor does the record support Petitioners' Reason "(4)", for Allowance of the Writ, that the prior allocation of Channel 2 on March 1, 1957 to St. Louis formed the "principal basis" for the second order. This contention was fully considered by the Court below which concluded that the earlier allocation of Channel 2 to St. Louis had not been so relied upon by the Commission as to require reversal and reconsideration. On this point, the Court of Appeals said (*Fort Harrison Telecasting Corporation* v. *Federal Communications Commission, supra*, at 386, Pet. App. 14a):

> "Temporary authorizations for station operation granted by the Commission should not be made the basis of preferring the holder of the authorization over other competing applicants for a permanent license. Similarly, where cities are competing for channel allocations, a temporary allocation to one city rather than another should not operate to create vested rights. *But each situation of this sort must be judged on its own merits, and we are satisfied that the Commission's conclusions here are adequately buttressed by the other grounds on which it relied. Under the circumstances, we do not believe we would be justified in setting aside the Commission's action because it relied in part on the line of reasoning here under discussion.*" (emphasis supplied)

This was an eminently reasonable conclusion. For the Commission was explicit that its primary purpose, in deleting VHF Channel 2 from Springfield, was to enhance the opportunities for multiple UHF service in Springfield, and that use of Channel 2 in St. Louis and Terre Haute was a mere "by-product" of this primary objective.[1]

---

[1] As noted above at page 6, the Commission stated: "as a by-product of not using Channel 2 in Springfield" (J.A. 321) the channel "may continue to be used in St. Louis" . . . "It may also be used to provide Terre Haute with a second local VHF service . . ." (J.A. 321)

Nor is there basis for inference that the 1962 decision reflected bias because three of the Commissioners had also served at the time of the March 1, 1957 order, for, as the Court of Appeals noted, "the membership of the Commission which rendered the 1962 decision was substantially different from the membership participating in the 1957 decision."[2] Besides, even as to the members holding over, the Court of Appeals had held in its July 27, 1961 decision that:

> "as the United States recognizes, it is unnecessary for the Commsision to reconsider the conclusion expressed in its Report and Recommendation of February 16, 1961, that no Commissioner is disqualified and no party is absolutely disqualified . . ."
>
> (*Sangamon Valley Television Corporation* v. *United States*, 111 U. S. App. D. C. 113, 294 F.2d. 742)

Indeed, no claim of bias was included in the notice of appeal or stipulated issues filed with the Court of Appeals or in this Court, nor is there any factual basis for the vague innuendos in footnotes 16 and 19 of the Petition.[3]

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[2] *Fort Harrison Telecasting Corporation* v. *Federal Communications Commission, supra*, at p. 384.

[3] As noted above, Judge Horace Stern, after a full hearing, found that Signal Hill's ex parte presentations were made "in the honest belief that there was nothing illegal or improper in so doing in a rule making proceeding, a view more or less generally held at the time by members of the industry, by other interested parties, by public officials, and apparently by lawyers as well." (19 Pike & Fischer Radio Regulation 1055 at 1073, Finding of Fact 22.) The Commission adopted the Initial Decision, almost in toto, including the conclusion that no member of the Commission was disqualified to participate in the further proceedings and that the conduct of no party was such as to disqualify it. (19 Pike & Fischer Radio Regulation 1055). The Court of Appeals held that it was unnecessary for the Commission to reconsider this conclusion (*Sangamon Valley Television Corporation* v. *United States*, 111 U.S. App. D. C. 113, 294 F. 2d. 742) and this holding has never been challenged by petitioners.

5. Petitioners' Reason "(5)" for Granting the Writ is that the deintermixture order will leave "the people of the State of Illinois" without a vitally needed wide coverage television station in this "centrally located state capital." But, as pointed out above in answering to Petitioners' Reason "(2)", the Commission's decision to delete the *VHF* channel, was to provide more rather than less service by preserving and fostering multiple UHF service. The Court below aptly disposed of this question (*Fort Harrison Telecasting Corporation* v. *Federal Communications Commission*, *supra*, at 383, 384, Pet. App. 8a):

> "We conclude that so long as the television transmission service allocated to a community, whether it be solely VHF, UHF, or a combination of both, is determined on the basis of relative need, amounts to a fair and equitable distribution of service for that community, in relation to others, and gives efficient service to the community, the standard set out in Section 307(b) is fully met.
>
> "We think that the Commission's action here with respect to Springfield—giving it four UHF channels, one reserved for educational purposes, and no VHF channel—meets this test . . .
>
> "While we entirely sympathize with the desire of the State of Illinois and Sangamon for a VHF channel in Springfield, it is not within our competency or function to say that Springfield's need could be met only by a single VHF channel rather than by two additional UHF channels, in the light of all the circumstances shown."

CONCLUSION

The decision below is correct. It involves resolution of a television allocation problem peculiarly within the competence of the Federal Communications Commission. Decision depends upon the peculiar facts of the community concerned so that no issue of general importance is presented. Nor is there any conflict with decisions of other circuit courts or of this court. The petition for a writ of certiorari should therefor be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SANGAMON VALLEY TELEVISION CORPORATION
AND
STATE OF ILLINOIS,
Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, ILLIANA TELECASTING CORPORATION, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., PLAINS TELEVISION CORPORATION, AND METROMEDIA, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., PLAINS TELEVISION CORPORATION, and METROMEDIA, INC. IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 700

SANGAMON VALLEY TELEVISION CORPORATION

AND

STATE OF ILLINOIS,

Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, ILLIANA TELECASTING CORPORATION, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., PLAINS TELEVISION CORPORATION, AND METROMEDIA, INC.,

Respondents.

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OPINIONS BELOW

The opinion of the court below (Pet. App. pp. 1a-21a) is reported at 324 F. 2d 379. The Report and Order of

the Federal Communications Commission (J.A. 303-332) which the court there affirmed is unofficially reported in 23 Pike and Fischer, *Radio Regulation* 1579 (1962).

JURISDICTION

The judgment of the court of appeals was entered June 27, 1963. A petition for rehearing en banc filed by Sangamon Valley Television Corporation was denied on September 25, 1963; a like petition by the State of Illinois was denied on November 6, 1963. The joint petition for certiorari was filed on December 24, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether rule-making action of the Federal Communications Commission substituting UHF channels 26 and 36 for VHF channel 2 in Springfield, Ill., a predominantly UHF area, and shifting the thus deleted VHF channel to St. Lous, Mo. and Terre Haute, Ind., predominantly VHF areas, with a view to encouraging "the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303(g)), violates Section 307(b) of the Communications Act (47 U.S.C. Sec. 307 (b)).

STATUTE INVOLVED

Section 303(g) and Section 307(b) of the Communications Act of 1934, as amended (47 U.S.C. Secs. 303(g) and 307(b)) provide:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> * * * *
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage

the larger and more effective use of radio in the public interest;

* * * * *

Sec. 307 . . .

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

STATEMENT

The instant joint petition arises from the Commission's Report and Order of July 18, 1962 (J.A. 303-332) "deintermixing" Springfield, Ill., St. Louis, Mo. and Terre Haute, Ind.—by substituting UHF channels 26 and 36 for VHF channel 2 in Springfield (a predominantly UHF area), and by shifting VHF channel 2 to St. Louis and Terre Haute (predominantly VHF areas where UHF allocations made in 1952 have not been providing a "radio service"). That rule-making action, as affirmed by the court below, has its antecedents which explain and (undersigned respondents believe) fully justify the result there reached.

In its spectrum allocation report in 1945 the Commission recognized that the 13 VHF channels (later reduced to 12), which it there set aside for commercial television use, were insufficient to provide a nationwide competitive television system, and accordingly reserved a substantial portion of the UHF band for *experimental* television purposes.[1] In its Sixth Report of April 14, 1952, issued after

[1] Report in FCC Docket No. 6651, Mimeo 82387, May 1945 (see 1 Pike and Fischer, *Radio Regulation*, Pt. III, pp. 91:96-98, hereinafter cited as —— RR ——).

a four-year study (1948-1952), the Commission added 70 UHF channels (channels 14 through 83) to the 12 VHF channels (channels 2 through 13) for regular television broadcast purposes.[1] Basic to this report was the assumption (then justified but disproved by subsequent developments) that the "intermixture" and utilization of VHF and UHF channels in the same major markets would result in the manufacture of nothing but all-channel receivers (para. 189), and that the new UHF channels would thus become in due course, with only 15 million VHF receivers then in use, "an integral part of a *single*, nationwide television service" (para. 197).[2]

As a concomitant part of its Sixth Report, the Commission promulgated a detailed allocation table (now Rule 73.606, 1 RR 53:606) designed to provide an aliquot share of television assignments to each of the several states and communities (47 U.S.C. Sec. 307(b)). There is was concluded that St. Louis needed six commercial facilities, Springfield, two, and Terre Haute two—a determination from which petitioners at that point sought no review. In line with its 1952 intermixture concept, three of the six commercial assignments to St. Louis were in the VHF band (channels 4, 5, and 11) and three in the UHF band (channels 30, 36, and 42). In like fashion one VHF and one UHF channel were allocated to Springfield (channels 2 and 20), and one VHF and one UHF to Terre Haute (channels 10 and 63) for commercial use.

Within two years after the issuance of the Sixth Report it became painfully apparent to large segments of

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[1] See Sixth Report of April 14, 1952, 1 RR Pt. III, 91:606-607 (para. 22).

[2] Sixth Report of April 14, 1952, 1 RR Pt. III, 91:661-665 (emphasis supplied throughout this brief). As we shall see, the intermixture feature of the Sixth Report was subsequently repudiated by the Commission in its Report and Order of June 26, 1956 in FCC Docket No. 11532 (13 RR 1571), a fact which petitioners choose to ignore (cf. Pet. pp. 6, 16).

the broadcast industry that the policy of intermixing VHF and UHF channels in the same markets was not producing the competitive pattern which the Commission had originally intended. For example, within weeks after the *second* VHF station went on the air in St. Louis in 1954, two UHF stations in that large market folded. In the smaller Terre Haute market, where a VHF applicant succeeded in obtaining a prompt uncontested grant, there were no "takers" thereafter for the UHF channel. However, in Springfield, where three UHF applicants merged and obtained a grant on UHF channel 20, while Sangamon Valley and another applicant were delayed by a comparative hearing for channel 2, the UHF station in Springfield (Station WICS licensed to respondent Plains Television Corporation) was providing a highly satisfactory television service.

In short, in *large* markets on the advent of a *second* VHF operation and in *small* markets on the advent of a *first* VHF station, it soon became all too clear that the UHF stations were folding and that the UHF channel assignments in such markets were going "begging"—being nothing more than "paper allocations" and not "radio service" contemplated by 47 U.S.C. Sec. 307(b). Unless corrective steps were taken, it was evident that some 70 UHF channels would go to waste.[1]

After much vacillation and considerable prodding by Congressional committees, the Commission finally concluded in its Second Deintermixture Report of June 26, 1956 in FCC Docket No. 11532 (13 RR 1571) that intermixture was not producing an integrated television system, that the 12 VHF channels were insufficient for a "fully competitive television system" (13 RR 1571,

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[1] The reasons for the inability of UHF stations to compete with VHF stations in markets blanketed by VHF signals were briefly summarized by the court below in a footnote to the instant opinion (Pet. p. 5a, fn. 3).

1575, para. 12), that VHF operations were thwarting the development of a satisfactory service on UHF in a number of markets, and "that the intermixture of UHF and VHF channels was, on a nation-wide basis, a failure".[1]

Pending a further study of the advisability and feasibility of moving all television into the UHF band (thus eliminating the intermixture problem), the Commission also concluded (as an interim measure) that it would re-examine its 1952 allocations with a view to determining, on a case-to-case basis, whether the deletion of VHF channels in predominantly UHF areas would "improve the opportunities for effective competition among *a greater number* of stations" (13 RR 1571, 1581, para. 31). To that end the Commission, concurrently with its June 26, 1956 Report, instituted some 13 rule-making proceedings designed to "deintermix" a number of areas where it appeared that UHF (if not stifled by VHF competition) would provide a satisfactory service (see 13 RR 1571, 1583-1584).[2] Among the proceedings thus instituted was one (FCC Docket No. 11747) to remove VHF channel 2 from Springfield, substituting two additional UHF channels therefor, and utilizing channel 2 in St. Louis, a market obviously destined to become all VHF and in need of additional television service.[3]

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[1] See *Jacksonville Journal Co. v. Federal Communications Commission*, 101 U.S. App. D. C. 12, 13, 246 F. 2d 699, 700 (1957).

[2] The 13 markets where deintermixture proceedings were instituted, deprecatingly labeled by petitioners as a "small number" (Pet. p. 7), included Springfield-St. Louis, Peoria-Moline, Albany-Schenectady-Troy, Hartford-Providence, Madison-Rockford, New Orleans, Evansville-Louisville, Fresno, Bakersfield, etc.

[3] The subsequent inclusion of Terre Haute can scarcely be termed an "afterthought" (cf. Pet. p. 7, fn. 10). As early as 1955 ABC had suggested that channel 2 be deleted from Springfield and assigned to Terre Haute as well as St. Louis.

After studying the voluminous comments filed by interested persons in FCC Docket No. 11747, the Commission on March 1, 1957 released a Report and Order (22 FCC 318) in which it found (in line with the five criteria spelled out in its Second Deintermixture Report) that the deletion of channel 2 from Springfield would not result in any significant number of people being deprived of a television service (para. 11); that several stations were providing a UHF service to the area, including Station WICS in Springfield, Station WTVP in Decatur, and Stations WEEK-TV and WTBH in Peoria (para. 8); that 85%-100% of the sets in the nine counties around Springfield were capable of receiving UHF signals (para. 9); that the flat terrain of central Illinois was ideally suited to UHF propagation (para. 10); and that the deletion of channel 2 would result in more rather than fewer television services in the Springfield-Decatur area (para. 24).

In subsequently seeking judicial review under 47 U.S.C. Sec. 402(a), Sangamon Valley raised a single issue—whether the Commission's Report and Order deintermixing Springfield-Terre Haute-St. Louis contravened 47 U.S.C. Sec. 307(b). From a per curiam affirmance of the Commission's 1957 Report (*Sangamon Valley Television Corporation* v. *United States*, 103 U.S. App. D.C. 113, 255 F. 2d 191 (1958)), Sangamon Valley petitioned for certiorari (No. 235, Oct. Term 1958).

Though certiorari was granted and the case remanded, this Court made it abundantly clear that its action was based not on the ground which Sangamon Valley had urged, but on intervening matters which the Solicitor General had brought to this Court's attention in his brief in opposition, namely, subsequently disclosed testimony before a House legislative committee that the 1957 Report and Order may have been tainted by ex

parte approaches of one or more participants therein. *Sangamon Valley Television Corporation* v. *United States*, 358 U.S. 49 (1958).

Following remand to the court below and thereafter to the Commission, it was ultimately determined in 1961 to institute an entirely new rule-making proceeding (FCC Docket 14267) to deintermix these markets (J.A. 6-7). Respondent American Broadcasting-Paramount Theatres, Inc. (ABC), as a nationwide television network interested in multiple competitive facilities in as many markets as possible; respondent Plains Television Corporation (Plains), as the licensee of UHF Station WICS in Springfield; and respondent Metromedia, Inc. (Metromedia), as the licensee of UHF Station WTVP in Decatur, along with several other interested persons, filed comments supporting the deintermixture proposal (J.A. 305-307).

After studying the subsequently submitted comments, the Commission by Report and Order adopted July 18, 1962 (J.A. 303-332, 23 RR 1579) again found, as it had in 1957, that the existing pattern of television service in the Springfield-Decatur-Peoria area is "predominantly UHF" (para. 19), that the nearest VHF stations are 78 and 86 miles away (para. 20), that the Springfield area is well suited terrain-wise for propagation and reception of UHF television signals (para. 18), that "UHF can provide, and is providing, a satisfactory broadcast service" in the Springfield area (para. 18), that the utilization of channel 2 in Springfield (thus introducing a second VHF signal into that market) would "preclude the possibilities for a fuller development of diversified television services in this area *in the near future* and cause a serious deterioration in existing UHF services" in central Illinois (Springfield-Decatur-Peoria) (para. 29), and that the failure to activate channel 2 in Springfield will not deprive anyone of an existing

service, nor in fact result in any area lacking a "satisfactory television signal", as evidenced by existing television set saturation figures for counties which Sangamon classified as potential "white areas" if Channel 2 were not utilized in Springfield (paras. 31-34).

The Commission further found that an immediate and important by-product of not using channel 2 in Springfield would be its availability for reassignment to Terre Haute where it would provide a second competitive local service and to St. Louis where it would provide a needed fourth facility (paras. 42-51).[1] The Commission accordingly concluded in its Report and Order of July 18, 1962 that channel 2 should be deleted from Springfield (with two UHF channels substituted therefor), and that it should be assigned to both Terre Haute and St. Louis (J.A. 303-332, para. 67).

On petition for review Sangamon Valley again contended that the Commission's action contravened 47 U.S.C. Sec. 307(b).[2] Pursuant to 5 U.S.C. Sec. 1038, respondents ABC, Plains, and Metromedia intervened in support of, and the State of Illinois in opposition to, the Commission's Report and Order. The court below again affirmed (Pet. App. pp. 1a-21a) and thereafter unanimously denied en banc review.

ARGUMENT

As borne out by the record (see J.A. 9-146) and the Commission's findings (J.A. 309-314, 321-325), the

[1] A number of similarly sized markets, several of which are smaller than St. Louis, have four commercial VHF operations (e.g. Denver, Minneapolis-St. Paul, Dallas-Ft. Worth, San Antonio, Portland, Washington, etc.).

[2] Neither in the court below nor here has Sangamon Valley assigned as error the Commission's subsequent determination that the approaches during the earlier proceeding were not of a character to disqualify Signal Hill as a television licensee. Thus, despite "coloring" resorted to by Sangamon Valley (Pet. pp. 8-12), undersigned respondents see no reason to comment on these side issues.

deintermixture action here taken by the Commission in 1957 and again in 1962 has resulted and will result in more rather than fewer services, not only in Terre Haute and St. Louis but also in central Illinois (Springfield-Decatur-Peoria):

Station WICS licensed to respondent Plains and an affiliate of NBC has been providing a television service to Springfield and its environs on UHF since September 1953 (cf. Pet. p. 6). Following the repudiation by the Commission of its 1952 intermixture concept in its Report of June 26, 1956 (13 RR 1571) and the issuance of its 1957 Reports and Orders deintermixing Springfield and Peoria (22 FCC 318, 22 FCC 342), WICS erected a taller tower and increased its power some 20-fold (J.A. 312). In April 1959 Plains established a UHF semi-satellite operation in Champaign, Ill. (Station WCHU), by which many of the programs broadcast by Station WICS from the capital of Illinois are made available to the Champaign-Urbana area, thus providing some competition for VHF Station WCIA (Ch. 3) in that market (J.A. 312). And in 1960 Plains acquired the UHF station in Danville, Ill. and has continued to provide that community with a station of its own (J.A. 312).

Also, as a result of the Commission's 1956-1957 deintermixture actions, a third UHF station (WMBD-TV) was placed on the air in Peoria in January 1958 (cf. J.A. 311). UHF Station WEEK-TV in Peoria established a satellite UHF operation in La Salle, Ill. (Station WEEQ-TV) in November 1957, and UHF translators have since been installed in La Salle by the other Peoria stations (J.A. 311). Station WTVP, now licensed to respondent Metromedia, has continued to serve the Decatur-Springfield area on UHF (as an ABC affiliate), and its programs are now available in Champaign-Urbana via a UHF translator (J.A. 312). And with the

termination of the instant litigation, there is every reason to believe, in the light of what happened in Peoria and in view of the pendency of two applications for UHF channel 26, that Springfield will in due course have a second station of its own on the UHF channels which have been substituted for channel 2 (cf. J.A. 311).[1]

A further by-product of the Commission's 1957 and 1962 actions is an increase in the number of television services elsewhere. Channel 2 is already providing a fourth commercial (non-network) service in the large St. Louis market.[2] And although UHF channel 63 had been going begging in Terre Haute, after the only V in that market was activated in 1954, thus creating a monopoly situation, the allocation of another VHF channel to Terre Haute has already resulted in a rash of applications to provide a second competitive service in that market. Cf. *Fort Harrison Telecasting Corp.* v. *United States*, 324 F. 2d 379, 386-387 (C.A.D.C. 1963).

Thus, by deintermixing Springfield (and Peoria) in 1957, action which the Commission reaffirmed after an entirely new rule-making proceeding in 1962, UHF stations and services in central Illinois have survived and multiplied, notwithstanding the presence of *one* wide-

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[1] With the uncertainty which has prevailed since 1957 as to whether VHF channel 2 is or is not to be activated in Springfield, it is not surprising that potential UHF operators have been slow to risk a half-million dollars on a second UHF station in that market until such uncertainty is removed. The fact that two applicants have filed for UHF channel 26 would seem to refute petitioners' assertions (Pet. p. 8, fn. 11, p. 17) that the new UHF assignments will not be activated in Springfield.

[2] Contrary to Sangamon Valley's assertion (Pet. p. 3, fn. 3) that "the addition of Channel 2 to St. Louis left 220 Television without a network", Signal Hill Telecasting Corporation was already operating on channel 2 in St. Louis (April 1957), as an ABC affiliate, before 220 Television acquired a VHF channel in St. Louis. See *St. Louis Amusement Co.* v. *Federal Communications Commission*, 104 U.S. App. D. C. 45, 46, 259 F. 2d 202 (1958), cert. den. 358 U.S. 894 (1958).

coverage VHF signal in that general region (Station WCIA on channel 3 in Champaign). If a second wide-coverage VHF facility were activated in central Illinois (on VHF channel 2 in Springfield), WICS would lose its network affiliation (NBC) and hence the necessary programming, audience, and revenues with which to operate. This in turn would spell the end of its UHF satellite operation in Champaign and its marginal operation in Danville. Furthermore, past experience in comparable situations uniformly shows that a second wide-coverage VHF service in Springfield would jeopardize if not destroy Metromedia's UHF operation in Decatur (see J.A. 313-315).

In short, by removing channel 2 from Springfield and reassigning it to both Terre Haute and St. Louis, the following improvements in the number of competitive television services have already occurred or are in the immediate offing—Terre Haute will have two stations rather than one (both VHF); St. Louis, a market originally deemed important enough to merit six commercial facilities, will have four instead of three such operations (on VHF); Springfield, instead of being limited to one facility (on VHF), will have at least two stations (on UHF); Decatur and Danville will continue to have stations of their own on UHF; Champaign will continue to enjoy a second competitive service; the three UHF Peoria stations and a UHF satellite in La Salle will not be endangered by a second wide-coverage VHF operation in central Illinois (J.A. 315).

Despite these beneficent results from not utilizing channel 2 in Springfield—of more rather than fewer television facilities in Terre Haute, in St. Louis, and in numerous cities in central Illinois—petitioners argue that the Commission was foreclosed *as a matter of law* from taking the action which it did by reason of Section 307 (b) of the Act (Pet. pp. 14-24). Petitioners would place

a construction on that section which would preclude the Commission from deintermixing *any* market. Notwithstanding the admitted fact that the 12 VHF channels are not enough to provide a nationwide competitive system, and notwithstanding the fact that UHF channels become "paper allocations" in markets the size of Springfield, when a VHF station commences operating therein, petitioner says that a VHF channel must be assigned to Springfield by reason of Section 307(b), regardless of the public interest consequences and even though such action will mean fewer services rather than more services.[1]

The Communications Act puts the Commission in no such straight jacket. Section 303(g) of the Act confers on the Commission the responsibility of encouraging "the larger and *more effective use of radio* in the public interest" (47 U.S.C. Sec. 303(g)). Section 307(b) in turn requires the Commission to so distribute licenses, frequencies, hours of operation and power among the several states and communities "as to provide a fair, *efficient*, and equitable distribution of *radio service*" (47 U.S.C. Sec. 307(b)). Unused UHF allocations which exist only on paper do not constitute "radio service". Since these two sections of the same statute must be read in *pari materia*, neither should receive a gloss which needlessly nullifies the ultimate standard laid down by Congress—"public

[1] Despite petitioners' contrary assertions (Pet. pp. 13, 16-17, 19), the Commission has never sought "equality" in the channel assignments to a given community for the sake of "enhancing the competitive positions of individual station operators". The Commission's concern has been in seeing that a given market which could well support 3 stations (either UHF or VHF) and which is entitled to that many diverse program sources is not in fact restricted to a single facility in situations (as here) where it is not possible, with only 12 VHF channels to work with, to allocate more than one VHF station thereto, and where, because of VHF's highly advantageous competitive position, one such operation on VHF (with other outside VHF signals) would destroy all UHF competition in that particular market.

interest, convenience, and necessity" (47 U.S.C. Sec. 307 (a)). See *Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App. D. C. 342, 344-345, 210 F. 2d 24 (1954).

Thus, an intermixed system which transforms UHF assignments into "paper allocations" does not encourage the "larger and more effective use of radio" (Section 303(g)). An intermixed system is not "efficient" nor does it result in a fair and equitable distribution of "radio service" when the net effect of the VHF allocation is to blot out one or more existing UHF operations (Section 307(b)).[1] In short, a policy of deintermixture, which results in more rather than fewer television services, instead of contravening Section 307(b) of the Act, gives full effect to the Congressional mandates embodied in Sections 303(g) and 307(b).

The Commission's authority, by prior rule-making, to set aside one class of frequencies for "communities" of one type and a different class of frequencies for "communities" of another, despite Section 307(b) objections interposed thereto, has long been sustained in AM proceedings. See *Huntington Broadcasting Co.* v. *Federal Communications Commission*, 89 U.S. App. D. C.

[1] The "radio service" which the Commission is under a duty to distribute efficiently and equitably embraces not only "coverage" but also "origination facilities". *WSIX Broadcasting Station*, 8 RR 216, 217-218 (1952); *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 362 (1955). The Commission's priorities contemplate at least one signal to as much of the United States as possible (Priority 1), at least one "mouth-piece" of their own to communities of substantial size (Priority 2), and *multiple* transmission and reception services throughout the United States on such frequencies as remain (Priorities 3-5). In short, the Commission has quite properly looked askance at any allocation pattern which would create a monopoly situation by limiting substantial-sized markets to a single outlet of their own. As found by the Commission this could well be the situation if VHF channel 2 were activated in Springfield (J.A. 314-315).

222, 192 F. 2d 33 (1951); cf. 47 U.S.C. Sec. 303(a) (b) (c) and (d). Thus, in deciding to make greater use of UHF channels in areas where UHF is providing a satisfactory service, and to shift VHF channels from such areas to VHF markets where UHF cannot in the immediate future provide a competitive service, the Commission did not exceed its statutory authority. Where there is "a reasonable factual and legal basis" for the Commission's action, "it is for the Commission, not the courts, to pass on the wisdom of the allocation scheme". *Coastal Bend Television Co. v. Federal Communications Commission*, 98 U.S. App. D. C. 251, 255, 234 F. 2d 686 (1956).

The Commission's authority by rule-making to allocate particular frequencies to given communities by a table of assignments, rather than on the basis of hit-or-miss applications, is likewise well established. *Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App. D. C. 342, 210 F. 2d 24 (1954); see 28 Fed. Reg. § 73.606. The action here complained of was rule-making action (J.A. 6; see 28 Fed. Reg. § 73.607; cf. Pet. p. 14). As made clear by the Administrative Procedure Act, where rule changes are effectuated by rule-making, "a concise general statement of their basis and purpose" suffices (5 U.S.C. Sec. 1003(b)). Thus, the elaborate Report and Order here issued by the Commission far exceeds the minimal requirement of the APA and would in fact suffice even in an adjudicatory proceeding. Cf. *Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App. D. C. 342, 345-346, 210 F. 2d 24 (1954).

In sum, except for one matter yet to be mentioned, the instant joint petition relies on the same cases (cf. Pet. pp. 9 and 15) and makes the same arguments which this Court seemingly rejected in 1958 (358 U.S. 49). The one new matter is the "all channel" receiver legislation enacted July 10, 1962 (see 47 U.S.C. Sec. 301(s)).

The ban imposed by the 1962 statute on the shipment in interstate commerce of sets not equipped to pickup both VHF and UHF signals does not become effective until May 1, 1964, and will not apply to sets theretofore manufactured nor to the more than 50 million VHF sets already in the hands of the public. Since many VHF-only sets in use when that ban becomes effective will still have an operating life of another six years or more, it will be 1970 or later before UHF can hope to make much inroad into areas which otherwise receive the programs of all three networks *on VHF*. In the meantime, the differences in UHF and VHF coverage and the advertisers' preference for VHF cannot be ignored. Thus, for all practical purposes, if the Commission had activated a second wide-coverage VHF facility in central Illinois on July 18, 1962, eight days after the all-channel receiver legislation was enacted, the *immediate* consequences of such action on the number of UHF stations now operating in that area would have been no less disastrous than such action taken before the all-channel receiver legislation was enacted.

The 1962 legislation was duly considered by the Commission in the Report and Order here challenged (J.A. 318-320) and ir turn by the court below (Pet. App. pp. 10a-11a). With all deference to petitioners, Congress did not there repudiate "deintermixture". It did suggest that the Commission declare a moratorium on then pending proposals to delete *operating* VHF stations from markets with one or more UHF stations, so as to give the all-channel receiver legislation a fair trial. The disruptive considerations which militated against deleting an *operating* V, and which moved Congress to ask that such proceedings be held up in 8 markets, similarly dictated, if status quo was the desideratum, that channel 2 (heretofore unused) *not* be activated in Springfield. The special situation in Springfield was expressly brought to the attention of Congress prior to the enactment of the

all-channel legislation and the release by the Commission of the instant Report and Order. See H. R. Rep. No. 1559, 87th Cong., 2d Sess., 7-8, 21, 22-26, and S. Rep. No. 1526, 87th Cong., 2d Sess., 6-7, 14, 15-19.

CONCLUSION

The Commission's rule-making action here challenged was properly affirmed by the court below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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January 23, 1964

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 700

SANGAMON VALLEY TELEVISION CORPORATION and STATE OF ILLINOIS, PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 324 F.2d 379. The decision of the Federal Communications Commission (J. App. 303-332)[1] is not officially reported, but is reported unof-

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[1] "J. App." refers to the printed joint appendix filed in the court of appeals.

ficially at 23 Pike and Fischer, Radio Regulation 1579.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1963. A petition for rehearing *en banc* filed by Sangamon Valley Television Corporation was denied on September 25, 1963; a petition for rehearing *en banc* filed by the State of Illinois was denied on November 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1354(1).

QUESTION PRESENTED

Whether the Federal Communications Commission violated Section 307(b) of the Communications Act or acted arbitrarily when it substituted two UHF television channels for a VHF channel at Springfield, Illinois, upon the finding that the public interest would be better served if the channel assignments at Springfield were all UHF.

STATUTE INVOLVED

Section 307(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*, is set forth in the petition at p. 2.

STATEMENT

On July 18, 1962, the Federal Communications Commission assigned UHF channels 26 and 36 to Springfield, Illinois, and transferred VHF channel 2 from that city to St. Louis, Missouri, and Terre Haute,

Indiana (J. App. 303-332). The order results from a new rule-making proceeding instituted after the court below, upon a remand from this Court, had vacated a similar order of the Commission issued on March 1, 1957 (22 F.C.C. 318) because of *ex parte* approaches made to Commissioners. *Sangamon Valley Television Corp.* v. *United States*, 358 U.S. 49; *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (C.A.D.C.); *Sangamon Valley Television Corp.* v. *United States*, 294 F. 2d 742 (C.A.D.C.). The petition for certiorari challenges the Commission's action on the merits.

The pertinent background is as follows:

1. On April 14, 1952, the Commission issued its "Sixth Report and Order" (17 F.R. 3905) promulgating a nationwide Table of Assignments of television channels. That order, which added 70 UHF channels to the 12 VHF channels previously available for television broadcasting, "intermixed" both UHF and VHF assignments in most communities. Contrary to the Commission's expectation, however, the UHF channels were not extensively used where intermixed with VHF channels. Following a general allocation proceeding to look into the matter, the Commission issued its *Second Report on Deintermixture* on June 26, 1956 (21 F.R. 4958; 13 Pike and Fischer, Radio Regulation 1571). It there concluded that UHF stations, although providing satisfactory service and capable of competing successfully with other UHF stations, were unable as a general rule to survive direct competition by VHF stations. The chief reasons were that UHF

transmission covers a smaller area in some terrains and most television sets were not equipped to receive UFH signals; so that UHF stations were at a competitive disadvantage *vis-à-vis* VHF stations in obtaining network affiliations, listeners, and advertisers. *Id.*, 21 F.R. at 4959; 13 Pike and Fischer, Radio Regulation at 1574.[2] Pending a long range solution to the problem of making effective use of the 70 UHF channels, the Commission decided to take interim action to improve the opportunities for more effective competition among a greater number of television stations in individual areas by "deintermixture", i.e., by deleting VHF channels from predominantly UHF areas and adding VHF channels to predominantly VHF areas. It set forth general criteria for determining the appropriate areas, and issued notices of proposed rule making looking toward the addition or deletion of VHF channels in thirteen communities. *Id.*, 21 F.R. at 4962; 13 Pike and Fischer, Radio Regulation at 1582-1583.

One of these thirteen notices (Docket No. 11,747; 21 F.R. 4968) proposed to substitute a UHF channel for VHF channel 2 in Springfield, Illinois, and to assign channel 2 to St. Louis, Missouri. At that time Springfield had one VHF channel (channel 2) assigned but not in use, and two UHF channels (one of which was reserved for educational use). Following

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[2] See also, *Greylock Broadcasting Co.* v. *United States*, 251 F. 2d 748, 749 (C.A.D.C.); *Coastal Bend Television Co.* v. *United States*, 234 F.2d 686 (C.A.D.C.); Note, *The Darkened Channels: UHF Television and the FCC*, 75 Harv. L. Rev. 1578, at 1582 *et seq.* (1962).

a rule making proceeding, the Commission issued an order on March 1, 1957, substituting two UHF channels for Channel 2 at Springfield, and transferring Channel 2 to St. Louis and Terre Haute, Indiana. The Commission's order also modified the authorization of Signal-Hill Telecasting Corporation (Signal Hill), the then existing licensee on Channel 36 in St. Louis, to provide for temporary operation on Channel 2 pending a hearing among competing applicants for regular operation on that channel. *Television Allocations in Springfield, Ill.-St. Louis, Mo. Areas*, 22 F.C.C. 318.

On petition for review by Sangamon Valley Television Corporation (Sangamon), an applicant for Channel 2 at Springfield, the court below affirmed the deintermixture of Springfield, holding that the Commission's order was not inconsistent with Section 307 (b) of the Communications Act, 47 U.S.C. 307(b), or otherwise improper. *Sangamon Valley Television Corp.* v. *United States*, 255 F.2d 191 (C.A.D.C.).

Sangamon petitioned this Court for certiorari. In opposing certiorari on the merits, the Solicitor General and Commission counsel called the Court's attention to testimony before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, given subsequent to the decision of the court of appeals, which indicated that certain parties to the rule making proceeding had made *ex parte* presentations on the merits to members of the Commission while the proceeding was pending before the Commission. In light of the Government's representations, the Court granted certiorari, vacated the

judgment below, and remanded the case for such action as the court of appeals might deem appropriate. *Sangamon Valley Television Corp.* v. *United States*, 358 U.S. 49. The court of appeals thereupon vacated the Commission's order of March 1, 1957, and remanded the case to the Commission for an evidentiary hearing on the alleged misconduct. *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (C.A.D.C.). Upon receipt of the Commission's report (*Sangamon Valley Television Corp.*, 19 Pike & Fischer, Radio Regulation 1055), the court of appeals held that basic fairness and the passage of time necessitated a fresh start to the rule making, and an up-to-date record, but that the Commission need not reconsider its conclusions as to the *ex parte* matters. *Sangamon Valley Television Corp.* v. *United States*, 294 F.2d 742 (C.A.D.C.).

In the meantime, the Commission continued to consider measures to aid the development of UHF service generally, and, on July 27, 1961, initiated eight new deintermixture proceedings. *In the matter of Fostering Expanded Use of UHF Television Channels*, Docket No. 14229, 21 Pike & Fischer, Radio Regulation 1711, 1714. It also recommended legislation authorizing the Commission to require that all television sets shipped in interstate commerce be equipped to receive UHF as well as VHF channels, and Congress enacted the proposal. Public Law 87-529, July 10, 1962, 76 Stat. 150. When the bill was being considered, the Commission, in response to Congressional inquiry, stated that it would stay the eight new deintermixture proceedings begun on July 27, 1961, during the

period needed to indicate whether the all-channel receiver legislation would in fact achieve the Commission's goal of a satisfactory intermixed television system (J. App. 319). However, the Commission expressly excluded from the proposed "moratorium" four pending deintermixture proceedings, including that involving Springfield (*ibid.*) and Congress acquiesced in this reservation. See H. Rep. No. 1559 on H.R. 8031, 87th Cong., 2d Sess., pp. 7-8, 18-23; S. Rep. No. 1526 on H.R. 8031, 87th Cong., 2d Sess., pp. 6-7, 13-16.

2. By a Notice issued on September 11, 1961, the Commission had instituted an entirely new rule making proceeding with respect to the assignment of Channel 2 (J. App. 6-7). After receiving comments and reply comments from all interested persons, the Commission issued a Report and Order on July 18, 1962, in which it again concluded that the public interest would best be served by substituting UHF Channels 26 and 36 for Channel 2, the only VHF channel in Springfield (J. App. 303-321). It also assigned Channel 2 to St. Louis and Terre Haute, where it would "fit" if not used in Springfield (J. App. 331-332, 321-328). As a result of this action Springfield, which previously had been assigned one VHF channel and two UFH channels (one of which was reserved for educational use), now has four UHF channels. Although petitioner Sangamon was an applicant for Channel 2 at Springfield, the channel has never been used there (J. App. 309, 315). A UHF station has operated on Channel 20 at Springfield since 1953, and competing applications have been

tendered to the Commission for the use of Channel 26 at Springfield (J. App. 311).

In determining that the deletion of Channel 2 from Springfield would serve the public interest, the Commission stated that its general objective was (J. App. 328):

> to distribute television channel assignments in the manner which is most likely to augment opportunities for full and effective use of the television broadcast frequencies and to provide the greatest amount of television service to the public in the communities involved . . .

and that, with respect to Springfield, its primary purpose was (J. App. 309-310):

> to provide Springfield, the capital of the State of Illinois, with a 1960 population of 83,271 and a population of 146,539 in its home county (Sangamon), with television assignments which offer the most realistic opportunities for the development of adequate television services to fill the needs and interests of the residents of the Springfield area. The question we must decide is whether all UHF assignments or VHF Channel 2 in combination with UHF assignments would best do so under present conditions, for it does not appear that other VHF channels may be assigned to Springfield under existing rules.

The Commission's decision—making the television assignments in Springfield all UHF—took account of the fact that existing television service in the Springfield area is predominantly UHF (J. App. 310-313): In addition to the UHF station operating on Channel

20 at Springfield, a UHF station at Decatur, Illinois, is providing service to the immediate Springfield area, and three other UHF stations at Peoria, Illinois (about 58 miles north of Springfield), serve portions of the Springfield area (J. App. 311). The nearest VHF station is at Champaign, Illinois, approximately 78 miles northeast of Springfield (J. App. 311). The Commission found that UHF in the Springfield area was providing satisfactory service and making progress despite the handicap of competing with one outside VHF signal (from Champaign) (J. App. 310-313). Noting that by 1960 all of the homes having television sets in Sangamon County (in which Springfield is situated) were equipped for UHF reception, that substantial percentages of the television homes in neighboring counties were similarly equipped, that public acceptance of UHF in central Illinois had increased substantially since 1957, and that the UHF stations at Springfield and Decatur had taken measures to extend their coverage by increasing antenna height and power, and/or by establishing semi-satellite or translator stations (J. App. 312-313), the Commission concluded that UHF services in the Springfield area could be expected to continue to improve and expand if not subjected to additional VHF competition from a local station in Springfield (J. App. 320, 317),[8] whereas, on the contrary, the introduction of

[8] The Commission also considered the circumstance that a potential "white area" (area without service) might result from the deletion of channel 2 from Springfield since a VHF station would reach a larger area than the UHF stations, but concluded from the record that there would be no significant white area problem and that it was not in any

a second competitive VHF service in Springfield itself would preclude further UHF growth and cause a serious deterioration in the existing UHF services at Springfield and Decatur (J. App. 314-315). In view of the "blighting effect on existing UHF stations and on UHF development in the near future" which would be caused by a new VHF station at Springfield and the impossibility of assigning additional VHF channels to Springfield (J. App. 319-320, 310), the Commission determined that the public in the Springfield area would receive more television service if Channel 2 were deleted and two UHF channels substituted (J. App. 320-321, 328). It rejected the argument that it should refuse to deintermix Springfield because of the all-channel receiver legislation, noting that a new VHF station at Springfield would have immediate adverse effects on television service and that it would be some years before this legislation would alleviate the problems of UHF-VHF competition (J. App. 318-320).

3. The court of appeals (Chief Judge Bazelon and Judge Washington, with Judge Wright dissenting) affirmed the Commission's action with respect to Springfield (Pet. 1a-21a). It re-

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event likely to be permanent in view of the improvements in UHF service which could reasonably be expected (J. App. 315-317).

In a consolidated case brought by Fort Harrison Telecasting Company, a would-be applicant for channel 2 at Terre Haute which challenged the Commission's decision to consider only previously filed applications for channel 2 in Terre Haute, the court remanded with directions to accept

jected (Pet. 7a-10a) the arguments of Sangamon and the State of Illinois that Section 307 (b) of the Communications Act requires an equal distribution of VHF facilities among the States and communities. Citing *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 281-282, the court concluded that (Pet. 7a-8a):

> . . . so long as the television transmission service allocated to a community, whether it be solely VHF, UHF, or a combination of both, is determined on the basis of relative need, amounts to a fair and equitable distribution of service for that community, in relation to others, and gives efficient service to the community, the standard set out in Section 307(b) is fully met.

The court held (Pet. 8a-10a) that the Commission's action in giving Springfield four UHF channels (one reserved for educational use) met this test, stating (Pet. 10a): "it is not within our competency or function to say that Springfield's need could be met only by a single VHF channel rather than by two additional UHF channels, in light of all the circumstances shown." Finally, the court rejected (Pet. 11a-12a) petitioners' contentions that the Commission's 1962 decision to deintermix Springfield was arbitrary because the result duplicated the 1957 decision or because new deintermixture proceedings are being held in abeyance pending results from the all-channel receiver legislation.

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new applications for channel 2 at Terre Haute (Pet. 11a-17a). This aspect of the decision below is not involved in the petition for certiorari.

ARGUMENT

The decision below is correct and the petition presents no question of general importance warranting further review.

1. Petitioners' principal contention (Pet. 14-19)—that the substitution of two UHF channels for VHF channel 2 in Springfield violates the mandate of Section 307(b) of the Communications Act—rests on the basic misconception that the statute requires an equitable distribution of VHF channels as such, without regard to the concommitant distribution of UHF channels. But Section 307(b) provides that "the Commission shall make such distribution of . . . frequencies . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of *radio service* to each of the same" (emphasis added).[3] While it might well be proper to assign television licenses among the States without regard to the distribution of standard broadcast (AM) or FM frequencies, since they are different services, both UHF and VHF stations comprise one type of broadcast service which must be allocated as a whole.

The Commission here determined that Springfield would enjoy more television service if it had four competitively equal UHF channels rather than one competitively superior VHF channel which could not be supplemented with additional VHF assignments, and which would preclude the successful establishment of new UHF stations and seriously affect the ability

[3] Television is included within the definition of radio service. See Section 3(b) of the Communications Act.

of existing UHF stations in the area to continue in operation. In light of this finding, the Commission also determined that Channel 2 could be better utilized to provide another needed competitive service at St. Louis and in Terre Haute, since the existing VHF stations in these cities precluded the use of UHF assignments to meet their need for more service (J. App. 321, 322-323). These determinations meet the test of Section 307(b), as the court of appeals correctly held (Pet. 8a). The court below properly ruled that the standard of this section is fully met "so long as the television transmission service allocated to a community, whether it be solely VHF, UHF, or a combination of both, is determined on the basis of relative need, amounts to a fair and equitable distribution of service for that community, in relation to others, and gives efficient service to the community" (Pet. 8a).

Notwithstanding petitioners' assertion to the contrary (Pet. 13-16), this construction of Section 307 (b) is fully in accord with the decision of this Court in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266. In the *Nelson* case, the Court declined to construe the comparable provisions of the Radio Act of 1927, 44 Stat. 1166, as requiring equality among the States with respect to every type of station, stating (289 U.S. at 281-282):

> We find in the Act no command with the import upon which respondents insist. The command is that there shall be a "fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the States within

> each zone." It cannot be said that this demanded equality between States *with respect to every type of station* . . . . In making its "fair and equitable allocations", the *Commission was entitled and required to consider all the broadcasting facilities assigned to the respective States*, and all the advantages thereby enjoyed, and to determine whether, in view of all the circumstances of distribution, a more equitable adjustment would be effected by the granting of the application of Station WJKS and the deletion of Stations WIBO and WPCC. [Emphasis added.]

Nor does the decision below conflict with *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358. This Court there approved the principle that the Commission, when considering mutually exclusive applications for stations to serve different communities, should base its decision on which community has the greater need for service (349 U.S. at 361-362). But, as the court below noted (Pet. 7a), that does not mean "that the relative needs of two communities for television transmission service [must] be determined solely on the basis of the need for *VHF* service."[6]

The Commission did not ignore the relative need of Springfield for television service. Rather, it deter-

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[6] The State of New Jersey, for example, lies in a comparatively small area between the States of New York and Pennsylvania, and accordingly has only one VHF assignment, which is located at the city of Newark rather than at the state capitol. New Jersey clearly does not have an equal share of VHF channels in view of its considerable population, but this is not to say that it does not have an equal share of all channels and of television service.

mined that Springfield's need could best be met by making all television assignments in the community in the UHF bands (J. App. 318, 319-320). In *Allentown* (349 U.S. at 362) this Court recognized that the Commission, in appraising the relative needs of two communities for additional service, may properly consider the need of one of the communities for multiple local outlets. This was the approach followed in this case. The Commission weighed the adverse impact on existing and future UHF services to the public in the Springfield area which would result from a VHF station at Springfield.[7] *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475-476; *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 258 F.2d 440, 443-444 (C.A.D.C.). In sum, the Commission deleted Channel 2 from Springfield to make it possible for Springfield to have more service, and not because it deemed St. Louis or Terre Haute to have a greater need for the channel.

2. Petitioners' further contention (Pet. 20-23) that it was arbitrary for the Commission to proceed with

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[7] Petitioners' suggestion (Pet. 17) that the Commission acted on behalf of the "private economic interests of station operators" is without foundation. The Commission stated (J. App. 328): "Our primary objective is not, as it is maintained, to protect, equalize, or improve the economic or competitive position of individual licensees, but to distribute television channel assignments in the manner which is most likely to augment opportunities for full and effective use of the television broadcast frequencies and to provide the greatest amount of television service to the public in the communities involved."

the deintermixture of Springfield when new deintermixture proceedings are being held in abeyance until the results of the all-channel receiver legislation can be determined, was properly rejected by the court below (Pet. 11a). As the court of appeals noted (*ibid.*), the Commission notified Congress that the Springfield case would be one of four deintermixture cases which might be excluded from the "moratorium" on new deintermixture proceedings,* and this exclusion was accepted by the congressional committees concerned. H. Rep. No. 1559 on H.R. 8031, 87th Cong., 2d Sess., pp. 7-8, 18-23; S. Rep. No. 1526 on H. R. 8031, 87th Cong., 2d Sess., pp. 6-7, 13-16. The all-channel receiver legislation contains no provision limiting or affecting the Commission's power to proceed with deintermixture (Act of July 10, 1962, Public Law 87-529, 76 Stat. 150).

The Commission fully considered the effect of the legislation in its decision and gave sufficient reasons for its judgment that it should proceed with this case. It noted that the proceedings held in abeyance proposed the removal of an existing VHF service, whereas the dislocation here would result from failure to deintermix, since no station has ever operated on Channel 2 at Springfield (J. App. 319). In view of the "blighting effect on existing UHF stations and on UHF development in the near future", which would

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* Another of the excluded proceedings was the *Bakersfield Deintermixture Case*, 21 Pike and Fischer, Radio Regulation 1549, affirmed *sub nom. Trancontinent Television Corp.* v. *Federal Communications Commission*, 308 F.2d 339 (C.A. D.C.), in the face of a similar argument made on rehearing with respect to the new legislation.

result from the introduction of a VHF station in Springfield, and the time required to determine whether the all-channel legislation will in fact enable UHF stations to compete on an equal basis with VHF stations, the Commission reasonably concluded that "it would disserve the public interest to take serious dislocating action which would worsen the competitive situations in several areas, in the hope that the all-channel authority would eventually alleviate or end the adverse effects of that action on the public interest" (J. App. 319-320).[9] This conclusion, which was based on "the particular circumstances of this case" (J. App. 320), does not present any question of widespread importance in light of the general moratorium on deintermixture proceedings.

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[9] Petitioners' assertion (Pet. 22-23) that the Commission treated channel 2 as legally assigned to St. Louis rather than Springfield, lacks merit. In speaking of the "proposed introduction of a second VHF competitive service" in the Springfield area, the Commission was only referring to the fact that no station had ever operated on channel 2 in Springfield (J. App. 314, 315, 319). Moreover, there is no basis for pettioners' claim (Pet. 22) that the Commission "paid no heed to the prior appellate vacating of" its 1957 decision and merely reinstated that decision. As the court of appeals properly concluded (Pet. 11a), the Commission "made its present decision in the light of current considerations and current appraisals of the needs of the communities involved, rather than those of 1957," and its present "conclusions are amply explained and supported by its findings."

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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